INDEX

	PAGE
Docket Entries	1a
Indictment	5a
Excerpts From Notice of Motion to Dismiss Indictment	6a
Affidavit of Henry Singer in Support of Motion	9a
Affidavit of Robert I. Toussie in Support of Motion	23a
Affidavit of Michael Rosen in Opposition	28a
Memorandum and Order of District Court	37a
Defendant's Requests to Charge	48a
Extracts From Transcript of Trial	52a
Motion for Judgment of Acquittal	104a
Charge by Court on Intent and Motive	133a
Defendant's Supplemental Requests to Charge	165a
Motion for Directed Verdict of Acquittal	265a
Rulings on Requests to Charge	266a
Court's Charge	273a
Defendant's Exceptions to Charge	291a
Court Recharges Jury	293a
Verdict	294a
Motion to Set Aside Verdict and for a New Trial	296a
Notice of Appeal	297a
Judgment & Commitment of District Court	298a
Opinion of Court of Appeals	299a
Judgment of Court of Appeals	310a
Order of Supreme Court Granting Petition for Writ of Certiorari	311a

PAGE

GOVERNMENT'S WITNESSES

Charles Milne Seymour, III:
Direct 68a
Cross 71a

Paul Akst:
Direct 75a
Cross 96a

Daniel Lewis:
Direct 97a

Edward J. Henderson:
Direct 98a

Joseph V. Corless:
Direct 99a
Cross 104a

Edward F. Falsey:
Direct 252a
Cross 257a

DEFENDANT'S WITNESSES

Samuel V. Dunkell:
Direct 113a
Cross 185a
Redirect 212a

Joseph A. Sutton:
Direct 122a
Cross 124a

PAGE

Robert I. Toussie:
Direct 127a, 147a, 176a
Cross 182a, 224a
Redirect 244a

Dr. Siegfried Baruch:
Direct 165a

Morris Sardell:
Direct 174a
Cross 175a

Joseph Bigio:
Direct 248a
Cross 249a

David Hanon:
Direct 249a

Saul M. Ancona:
Direct 251a

(A)

Docket Entries

THE UNITED STATES

vs.

ROBERT I. TOUSSIE

DATE	PROCEEDINGS
5-4-67	Before Bartels, J.—Indictment ordered filed.
5-8-67	Before Rosling, J.—Case Called—Deft. & counsel present—Deft. arraigned and enters plea of not guilty. Case adjd. to General Cal. O.R. continued. 30 days for motions granted.
6-8-67	Notice of Appearance filed.
7-7-67	Notice of Motiton filed for 1) Dismissing the Indictment, 2) To Suppress Evidence, 3) For a hearing pursuant to Rule 12(b)(4), 4) to Permit the defendant to inspect and/or copy Grand Jury Minutes, 5) To inspect and/or copy all statements, 6) Directing the U.S. Atty to serve and file Bill of Particulars etc., returnable 7-17-67.
7-17-67	Before Dooling, J.—Hearing on motiton dismissing indictment, etc. Case called—Motion adjd. to July 24, 1967 on request of deft.
7-24-67	—Govts. affidavit in opposition to defts. motion for various types of relief, etc., filed.

Docket Entries

DATE	PROCEEDINGS
(B)	
7-24-67	Before Dooling, J.—Case called—Hearing on motion dismissing the Indictment, etc. Motion argued—Decision reserved.
8-30-67—	By Dooling, J.—Decision rendered—Memorandum and Order filed on motion—Motion Granted and denied as indicated—Ordered that the motions to dismiss indictment, to inspect the Grand Jury minutes and for a hearing under Rule 12(b)(4) are denied. (See Memorandum P/Cs mailed to Attys.
8-13-67—	Govts. Bill of Particulars filed.
6-3-68—	Before Zavatt Ch J.—Case called at 12:00 Noon —Deft. and counsel not present—Case assigned to Judge Bartels as case #1 for trial on 8-26-68.
8-6-68	Govts. Amended Bill of Particulars filed.
8-26-68	Before Bartels, J.—Case called. Deft. and counsel Mr. Singer present. Marked Ready.
9-5-68	Before Mishler J.—Case called—Deft. and counsel present—Trial Ordered & begun—Jury selected and sworn by the Court—Government Rests—Defendants motion for Judgment of Acquittal—Motion Denied—Case adjourned to 9-6-68 at 10:30 A.M.

Docket Entries

DATE	PROCEEDINGS
9-6-68	Before Mishler J.—Case called—Deft and counsel present—Trial Resumed. Trial continued to 9-9-68 at 10:00 A.M.
9-9-68	Before Mishler, J.—Case called. Deft. and counsel present. Trial resumed. Deft. renews motion for Acquittal—Denied. Trial resumed on 9-9-68 at 9:30 A.M.
9-10-68	By Mishler, J.—Order of Sustenance filed. (Luncheon 14 persons).
9-10-68	Before Mishler, J.—Case called. Deft. and counsel present. Trial resumed. Jury returns at 2:55 P.M. with a verdict of guilty as charged. Jury polled. Jury discharged. All motions extended to day of sentence. Deft. O.R. Limits extended to continental U.S. Trial concluded.
9-10-68	Stenographers transcripts, 3 volumes, pages 1 to 509, filed.
10-29-68	Steno. transcript dated 9/10/68 filed.
11-29-68	Before Mishler, J.—Case called. Deft. and counsel present. Atty for deft moves to remake all motions previously made, etc. Motions denied. Deft sentenced pursuant to Sec. 4208(B) of Title 18, U.S. Code for Study and report. Geographical Bail limits restricted to New York State. Special visit permitted to the State of Oklahoma up to and including but not to exceed Dec. 13, 1968. Sentence stayed pending diligent prosecution of Appeal.

Docket Entries

DATE	PROCEEDINGS
11-29-68	Judgment & Commitment filed. Certified copies to Marshal.
11-29-68	Notice of Appeal filed.
11-29-68	Statement of Docket entries and duplicate copy of Notice of Appeal forwarded to Court of Appeals.

Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

67 CR 183

UNITED STATES OF AMERICA,

—against—

ROBERT I. TOUSSIE,

Defendant.

THE GRAND JURY CHARGES:

On or about and between the 23rd day of June 1959 and the 3rd day of February 1967, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant Robert I. Toussie wilfully and knowingly failed and neglected to perform a duty required of him by the Universal Military Training and Service Act of 1948, as amended, the Proclamation of the President of the United States and the Regulations issued and promulgated pursuant to said Act, by knowingly and wilfully evading and refusing registration by the Selective Service System. (Title 50, U.S.C., App. § 462(a))

A True Bill.

HAMILTON H. SALMON, III
Foreman

JOSEPH P. HOEY
United States Attorney
Eastern District of New York

Excerpts From Notice of Motion to Dismiss Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

67 CR 183

UNITED STATES OF AMERICA,

vs.

ROBERT I. TOUSSIE,

Defendant.

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavits of Henry G. Singer, Esq. and Robert I. Toussie, both sworn to on the 5th day of July, 1967, the indictment herein filed May 4, 1967, and the application for issuance of a warrant for the apprehension of defendant, sworn to by Joseph V. Corless and dated February 3, 1967, and upon all the prior pleadings and proceedings heretofore had herein, a motion will be made at a Criminal Motion Term of this Court, to be held at the United States Courthouse, 225 Washington Street, in the Borough of Brooklyn, City and State of New York, on the 17th day of July, 1967, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order:

1. Dismissing the indictment herein, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, upon the following grounds:

(a) The indictment fails to state facts sufficient to constitute an offense.

Excerpts From Notice of Motion to Dismiss Indictment

(b) The Statute, Title 50 U.S.C. App. § 453, requiring defendant to register for military training, and upon which the indictment herein is based, is unconstitutional in its application to defendant upon the facts and circumstances of this case, in that defendant's rights against self-incrimination under the Fifth Amendment to the United States Constitution are violated thereby.

(c) The evidence adduced before the Grand Jury and upon which the indictment herein is founded was illegally procured, seized and obtained by the Government, its agents, servants and employees, in violation of (1) the confidential privilege obtaining between defendant and his former attorney herein; (2) defendant's right to counsel. as provided in the Sixth Amendment to the United States Constitution; (3) defendant's right against self-incrimination, as provided in the Fifth Amendment to the United States Constitution; and (4) defendant's right to be protected from unlawful search and seizure, as provided in the Fourth Amendment to the United States Constitution.

(d) The indictment herein was not found within five years next after the alleged offense charged in the indictment was committed (18 U.S.C. § 3282).

2. Directing, pursuant to Rules 12 and 57 of the Federal Rules of Criminal Procedure, that the evidence and information illegally procured, seized and obtained by the Government, its agents, servants and employees, in violation of the defendant's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution and in violation of the confidential privilege obtaining between

attorney and client, as hereinabove set forth in paragraph 1(c) of this Notice of Motion, and any other evidence or information which may have been acquired through leads resulting therefrom, be suppressed and the Government be enjoined, barred and precluded from the use thereof as evidence against defendant in the instant prosecution, or in any other proceeding against defendant, or for any purpose whatsoever.

3. Alternatively, and in the event the relief hereinabove requested is not granted, directing that a hearing be held pursuant to Rule 12(b)(4) of the Federal Rules of Criminal Procedure, at which evidence relevant to the foregoing matters, as hereinabove set forth in paragraphs 1 and 2 of this Notice of Motion, may be adduced, and a determination had as to all issues of fact presented thereby.

• • • • •

7. At the same time defendant will move this Court for such other and further relief as to the Court may seem just and proper.

Dated: Brooklyn, New York
July 5, 1967.

Yours, etc.

HENRY G. SINGER
Attorney for Defendant
16 Court Street
Brooklyn, New York

To:

JOSEPH P. HOEY
United States Attorney
Eastern District of New York

Affidavit of Henry G. Singer in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

67 CR 183

UNITED STATES OF AMERICA,

—vs.—

ROBERT I. TOUSSIE,

Defendant.

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

HENRY G. SINGER, being duly sworn, deposes and says:

1. I am the attorney for the defendant Robert I. Toussie. I make this affidavit in support of the within motion. The relief requested essentially falls into two categories relating (1) to dismissal of the indictment and (2) pre-trial disclosure. Dismissal is sought upon the grounds of violation of constitutional right and the statute of limitations (see Notice of Motion, paragraph 1). In connection therewith application is also made for suppression of certain illegally seized evidence (*Id.* paragraph 2), alternatively for a hearing in advance of trial for development and determination of factual issues presented (*Id.* paragraph 3), and for inspection of the Grand Jury minutes (*Id.* paragraph 4). With reference to pretrial disclosure, defendant seeks discovery and inspection and a bill of particulars (*Id.* paragraphs 5 and 6). The grounds for the foregoing relief are hereinbelow set forth in this affidavit and the affidavit of Robert I. Toussie annexed hereto.

Affidavit of Henry G. Singer in Support of Motion

DISMISSAL OF THE INDICTMENT FOR FIFTH AMENDMENT VIOLATIONS AND THE STATUTE OF LIMITATIONS

2. The indictment herein was filed on May 4, 1967. A copy thereof is annexed hereto as Exhibit A. It charges defendant with failing and neglecting "to perform a duty required of him * * * by knowingly and wilfully evading and refusing registration by the Selective Service System". Parenthetical reference is made in the indictment to 50 U.S.C. App. §462a). That section, however, is but an omnibus penalty section covering violations of specific provisions of the Universal Military Training Act. It appears from the descriptive language of the indictment that the offense allegedly committed by defendant is actually based on the provisions of 50 U.S.C. App. §453 (and proclamations and regulations issued in connection therewith), which provided, in relevant part, that "it shall be the duty of every male citizen of the United States * * * who * * * is between the ages of eighteen and twenty-six to present himself for and submit to registration * * *." Proclamation No. 2799, dated July 20, 1948, provided in relevant part that "(j) persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter".

3. We maintain that this registration requirement runs afoul of the Fifth Amendment upon two grounds. We place principal emphasis, at this juncture, upon the first of such grounds, which involves an interplay of the Statute of Limitations and the Fifth Amendment.

4. It may be presumed from the face of the indictment that defendant, in the Government's view, was first required

to submit to registration under Title 50 U.S.C. App. §453 on June 23, 1959.* The Universal Military Training Act does not contain a specific time limitation provision. Accordingly, we maintain that Title 18 U.S.C. §3282 applies, imposing a five-year limitation period during which a prosecution must be instituted. This prosecution was brought eight years after June 23, 1959, which is more than three years after the expiration of the five-year limitation period. In our view, if the duty to submit to registration first arose on June 23, 1959 and defendant then failed to register, as the Government claims, the crime was committed at that time and the Government had five years in which to prosecute, which it has failed to do.

5. We are cognizant of the fact that certain decisions among the lower Federal courts have taken the view that the duty to submit to registration is a continuing one and that so long as a person fails to register, he is amenable to prosecution.**

While this view may find some support in the Presidential Proclamations issued pursuant to §453, the statute itself does not impose a continuing duty, but rather expressly prescribes specific dates when a person is obligated to register. To the extent therefore that the Presidential Proclama-

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* Since one of the essential elements of the Government's case is to prove defendant's date of birth, we deliberately refrain, at this time, in accordance with defendant's rights, to volunteer information with respect thereto. It is evident, however, by reference to §453 and Presidential Proclamation No. 2799, that the Government has fixed upon June 23, 1959 as the date when defendant reached 18 years of age and was accordingly required to submit to registration.

** The relevant case law and Presidential Proclamations upon which these authorities rely, will be set forth in our memorandum of law.

tions import such a concept into the legislation, we submit that an unconstitutional delegation of legislative authority exists.

6. Subscription to the continuing duty theory, moreover, also leads to grossly absurd results and injustices, which Congress could not have intended. Under this theory, a person 70 years old could be prosecuted for having failed to register 52 years before at the age of 18. Indeed, under the continuing duty-theory, there is no time limit of any sort as to when a prosecution must be initiated—notwithstanding the inability of the defendant by reason of the lapse of time to secure the witnesses, documents and like factual and evidential matter, necessary to properly defend against the charge. So too, in further emphasizing the absurd results which follow from the continuing duty theory, the logical consequence thereof is that for each day that a person has failed to register, after the date first prescribed therefor, a separate crime is committed. A person who has failed to register for thirty days after reaching his eighteenth birthday, therefore, would be liable to the commission of thirty separate crimes, with a possible penalty of incarceration for 150 years.

7. Congress, moreover, has not provided that the Universal Military Training Act, and particularly, § 453 thereof, are exempt from the operation of the Statute of Limitations. To the contrary, Congress has expressly provided in Title 18 U.S.C. § 3282 that *"except as otherwise expressly provided by law"*, a person may not be prosecuted, tried or punished for an offense unless indicted within five years next after its commission (emphasis supplied). The Universal Military Training Act and § 453 thereof do not fall

within the exception to § 3282. Congress has not *"otherwise expressly provided"* therein "by law".

8. In addition to the foregoing, a far more compelling reason exists, predicated upon constitutional grounds, which mandates application of the 5 year Statute of Limitations from the date of first refusal to register, as required by law, and conclusively prohibits application of the continuing duty theory. Simply put, if registration is a continuing duty, under penalty of criminal sanction for having failed to do so from the date when registration was first required, registration at any time thereafter is tantamount to an admission of criminal culpability for having failed to register at any time prior thereto. Thus, in the case of defendant Toussie, if he registered at any time after June 23, 1959, the date selected by the Government for initial registration, he would be admitting guilt as to his past failure to register and subject himself to criminal prosecution therefor—notwithstanding his subsequent registration. In other words, registration cannot be compelled under penalty or criminal sanction for having failed to do so at any time after the date first prescribed therefor. Otherwise guilt is confessed.

9. In this case then, in accordance with defendant's rights under the Fifth Amendment to the Constitution, he cannot be charged for commission of a crime alleged to have occurred after June 23, 1959. And, as to the crime allegedly committed on June 23, 1959, the five-year limitation period applies and bars prosecution of the instant indictment. To hold otherwise is to deprive defendant of his rights under the Fifth Amendment which are paramount to any act of Congress, Presidential proclamation or regulation issued in connection therewith. Our position in this

regard finds ample support in the case law, including recent decisions of the Supreme Court of the United States, involving Communist Party, bookmaker, stamp and Circuit Court decisions as to firearm registration. These authorities will be set out in our memorandum of law being submitted herewith.

10. We also urge a second ground for dismissal of the indictment in the light of the Fifth Amendment. If the statement in the affidavit of Special Agent Corless (Exhibit B in support of complaint) is true, and the defendant "had not and would not register for the Selective Service" which involves inability to submit to military conscription for conscientious, religious, psychological and/or physical reasons, this might result in a situation where to compel registration, under penalty of criminal sanction, would be to compel self-incrimination. A defendant compelled by law to register under such circumstances, is being compelled to expose himself to criminal prosecution for failure to submit to induction in violation of the statute. The crime, if any, must be constitutionally held to be the failure to submit to induction—not registration.

11. Amplification in this affidavit of the facts and circumstances involved in paragraph 10 above and which may well render defendant, for conscientious, religious, psychological and/or physical reasons, unable to submit to registration, would serve to prejudice defendant's case in the event the matter goes to trial. We accordingly raise the foregoing aspect of the constitutional argument at this time principally for the purpose of preserving all of the defendant's rights thereto.

Affidavit of Henry G. Singer in Support of Motion

DISMISSAL OF THE INDICTMENT FOR FOURTH AND SIXTH AMENDMENT, AS WELL AS ADDITIONAL FIFTH AMENDMENT VIOLATIONS; INSPECTION OF GRAND JURY MINUTES AND SUPPRESSION OF EVIDENCE.

12. We advance a third ground for dismissal of the indictment upon constitutional grounds (Notice of Motion, paragraph 11[c]). It rests upon the illegal procurement by the Government of the evidence upon which the instant indictment is founded, tainting the prosecution of defendant and all proceedings relating thereto. In this connection we respectfully refer the Court to the application for issuance of a warrant for apprehension of defendant (hereinafter referred to as the "Complaint") by Joseph V. Corless of the F.B.I. dated February 3, 1967 (annexed hereto as Exhibit B), and the affidavit of defendant Toussie, which is also annexed hereto.

13. The complaint of Special Agent Corless initially recites in language almost identical with the indictment later returned herein, that defendant Toussie failed to perform a duty required of him by refusing to submit to registration by the Selective Service System. The said complaint then states the following, in relevant part:

> "The source of your deponent's information and the grounds for his belief are: (1) a review of Selective Service records which reveal that there is no record of registration by the defendant ROBERT I. TOUSSIE and (a) *an oral statement by an attorney representing the defendant,* ROBERT I. TOUSSIE to Selective Service personnel that the defendant had not and would not register for the Selective Service." (emphasis supplied)

Affidavit of Henry G. Singer in Support of Motion

A warrant was apparently issued on the basis of the foregoing complaint, and defendant arrested pursuant thereto on or about February 3, 1967, as more particularly set forth in defendant's annexed affidavit. Defendant was searched at the time of his arrest and thereafter taken before the Commissioner.

14. The indicated source of Agent Corless' information and belief, set forth in the complaint, is highly extraordinary—to say the least. It involves a flagrant intrusion upon, and violation of defendant's attorney-client privilege and rights to counsel under the Sixth Amendment. The name of the attorney who allegedly orally stated to Selective Service personnel that defendant had not registered for Selective Service is not divulged in the complaint. Defendant, in his annexed affidavit, however, states that he was represented on February 3, 1967 (the date of the complaint) by one Arthur Fields, Esq. As defendant indicates, Mr. Fields is an eminent member of the bar whose integrity is beyond reproach. The Government's claim that such information was divulged by Mr. Fields is accordingly incredible. Defendant further states that he is unaware of any conversation taking place between Mr. Fields and selective service personnel; and if such a conversation did take place, he never authorized Mr. Fields to state to the Government or any representative thereof that he had allegedly failed to register in violation of the Universal Military Training Act (without, of course, conceding the truth of such a statement). We maintain that, under the circumstances, the use by the Government of such information for purposes of initiating and furthering prosecution of the defendant, was improper and unlawful, and more particularly, cannot justify issuance of a warrant of arrest.

15. In addition to the constitutional infirmity above noted, the complaint was defective and insufficient to support the issuance of a warrant upon further grounds. Thus, the complaint does not indicate the name of the attorney allegedly representing defendant at the time, nor does it disclose the date the statement was made, to whom and where. Furthermore, the averment that "a review of Selective Service records" revealed "no record of registration by the defendant." standing alone, is highly inconlusive. The statement fails to indicate which Draft Board records were examined, by whom, and when. It would also be significant in connection with the time of the alleged review of the Draft Board records whether it was made after the alleged statement by the attorney, and whether it was in any way instigated thereby.

16. Moreover, the complaint is highly significant by its omission of any reference to the vital element of defendant's age. For aught that appears on the face of the complaint, defendant could have been seven years old at the time it was issued. We submit that an allegation as to defendant's age is necessary to sustain the complaint, and that such an allegation must be based upon sources which are not constitutionally tainted. Absent the allegation as to age, no probable cause for the commission of an offense is shown; and the alleged review by the F.B.I. of selective service records—regardless of the time and place such review may have been conducted—becomes a totally meaningless gesture, further reflecting upon the inadequacy of the complaint.

17. The chain of events which were set into motion by the defective complaint, as above set forth, are also replete

with further violation of defendant's rights. In the first place, any warrant of arrest issued on the basis of the complaint was illegal. Defendant, as stated in his annexed affidavit, upon being advised that a warrant had been issued, voluntarily surrendered to the F.B.I. Upon surrendering, a search of defendant was conducted incident to the arrest. The search was illegal and all information and leads developed as a result thereof, were its forbidden fruits.

18. The next step in the sequence of events set into motion by the initial violation of defendant's constitutional rights and the defective complaint was the proceeding before the Commissioner. The proceeding as a whole, we submit, was illegal under the circumstances and accordingly must be annulled. So too, its forbidden fruits as we shall hereinbelow demonstrate.

19. At the hearing before the Commissioner, as further set forth in defendant's annexed affidavit, the Assistant United States Attorney requested $50,000 bail. The Commissioner indicated that unless he were furnished with additional information (other than defendant's name and address) as to his brother Samuel's background and general circumstance, he would be constrained to impose bail. This occurred during the latter part of a Friday afternoon.

20. Obviously, the background information sought by the Commissioner, and any leads therefrom which could be developed by the Government, would be highly relevant to the elements of the offense charged; and their divulgence by defendant, accordingly, a virtual confession, with self-incriminatory implications, as to the elements of the Government's case; the matter of age is a prime example.

Affidavit of Henry G. Singer in Support of Motion

21. Defendant, after his brother Samuel's arraignment and the final action of the Commissioner therein, and acting under penalty of incarceration which would result from the imposition of bail late on a Friday afternoon, was constrained to disclose before the Commissioner the schools which he had attended and year of graduation. As defendant further states in his annexed affidavit, he specifically noticed F.B.I. Agent Corless, who was present in the courtroom, assiduously writing down this information while it was being given by defendant to the Commissioner.

22. The information which defendant was compelled to divulge under penalty of incarceration (at the hearing before the Commissioner) was a form of testimonial compulsion in violation of defendant's rights under the Fifth Amendment. The F.B.I. took down this information in open court.

23. The ultimate step in the chain of events was the return of the indictment against defendant by the Grand Jury. The circumstances which we have set forth above, commencing with the complaint by Special Agent Corless through the hearing before the Commissioner, inexorably demonstrate that the indictment eventually returned against defendant was predicated upon information and evidence illegally procured in violation of defendant's constitutional rights. The bases for constitutional taint, as we have seen, are manifold. To summarize:

> (a) The complaint of Agent Corless on its face evidences an illegal intrusion by the Government upon the confidential attorney-client privilege and violation of defendant's Sixth Amendment rights.

(b) The complaint otherwise failed to properly establish a basis for probable cause and was entirely defective.

(c) The warrant issued on the basis of the complaint was accordingly defective, and the search conducted of defendant incident to the arrest was illegal in violation of his Fourth Amendment rights.

(d) In view of the defective foundation for the proceeding, the hearing before the Commissioner was illegal in its entirety.

(e) Independent of the illegality of the entire hearing before the Commissioner, the testimonial compulsion to which defendant was subjected under penalty of incarceration, was illegal in violation of his Fifth Amendment rights.

Under the circumstances, and in view of this multifaceted violation of constitutional right, we respectfully maintain that the indictment must be dismissed.

24. In connection with this indicated dismissal of the indictment, we also request other relief as set forth in our Notice of Motion, namely, (1) inspection of the Grand Jury Minutes and (2) suppression of all illegally obtained evidence.

25. With respect to inspection of the Grand Jury minutes, we believe that the matter is covered by Rule 6(e) of the Federal Rules of Criminal Procedure, without more. It is there expressly provided in relevant part that "matters occurring before the Grand Jury" may be disclosed upon direction of the court.

> "at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury."

Certainly, the polluted nature of the evidence adduced before the Grand Jury—whether constituting the precise information illegally procured or further information developed by leads resulting therefrom—render the indictment constitutionally defective, affording a basis for dismissal.

26. So too, all of this information illegally procured during the course of the events outlined above, and as a result thereof, must be suppressed. Furthermore, as requested in the Notice of Motion, the Government must also be enjoined and precluded from the use thereof as evidence against the defendant in the instant prosecution, or in any other proceeding which may be instituted against him.

HEARING PURSUANT TO RULE 12, IN THE ALTERNATIVE

27. In the alternative, and without waiver of our position that the indictment be dismissed, and the illegally procured evidence suppressed, we maintain that, at the very least, a hearing pursuant to Rule 12 is indicated for development of the foregoing matters. Upon such a hearing the following matters, among others, may be ascertained:

(a) All facts and circumstances relating to the alleged statement by the attorney to selective service personnel, including the names of the attorney and Government employees involved, the relevant date and place, and the precise statement allegedly made.

(b) The precise acts of the Government undertaken after the statement was made and the nature of all information developed as a result thereof.

(c) With further reference to the complaint of Agent Corless, identification of the Draft Boards allegedly searched, the relevant dates and by whom.

(d) Whether the Government had any information as to defendant's age at the time the complaint was issued, and if so, the nature of the information and its source.

(e) The results of the illegal search of defendant, incident to arrest, including the nature of all information uncovered and secured, whether direct or of lead value.

(f) The precise acts of the Government undertaken after the illegal search was conducted and the nature of all information developed as a result thereof.

(g) The names of all Government agents present at the hearing before the Commissioner, and the precise information procured as a result of the violation of defendant's Fifth Amendment rights during the course of the hearing.

(h) The precise acts of the Government undertaken thereafter and the nature of all information developed.

(i) The sources of any other and further information presented before the Grand Jury.

• • •

WHEREFORE, it is respectfully prayed that for all the reasons hereinabove set forth, defendant's motion should in all respects be granted.

(Sworn to by Henry G. Singer on July 5, 1967.)

Affidavit of Robert I. Toussie in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROBERT I. TOUSSIE, being duly sworn, deposes and says:

I am the defendant herein. I make this affidavit in support of the within motion to dismiss the indictment, for suppression of evidence, inspection of Grand Jury minutes, and pre-trial disclosure, all as more particularly set forth in the Notice of Motion and affidavit of my attorney prefixed hereto.

I was previously represented in this matter by one Arthur N. Fields, Esq. On February 2, 1967 and, upon information and belief, pursuant to a request by the F.B.I. of Mr. Fields, I met with two Special Agents of the F.B.I., one of whom was a Mr. Corless, at Mr. Fields' office at 39 Broadway, New York City. My brother, Samuel R. Toussie, was also present. The F.B.I. agents first asked my brother various questions, including whether or not he had registered for the draft. The same questions were then addressed to me. In response thereto, I only furnished my name and address.

On the next day, February 3, 1967, a Friday, I was advised that a warrant for my arrest had been issued and arrangements were made for me to voluntarily surrender to the F.B.I. Accordingly, at about 1:30 P.M. on that day, I appeared together with my brother at the F.B.I. building on East 69th Street and Lexington Avenue in New York City. A paper was read by the F.B.I. which upon informa-

tion and belief, was a warrant for my arrest. My brother and I were then taken into a small room where we were searched and fingerprinted. F.B.I. agents Corless and one McKenna were present. A list was made out by them of our possessions and we were taken downstairs to be photographed. We then went to the United States Courthouse in Brooklyn. We stopped first at the office of Mr. Barnett; and from there, at about 4:00 P.M., we were taken to the Courtroom for a hearing before Commissioner Schiffman.

My brother was called first before the Commissioner. I heard the colloquy which took place. In substance, and insofar as here relevant, the following occured: The assistant prosecutor, Mr. Barnett, asked for $50,000 bail. The Commissioner indicated that he required further information as to my brother's background and general circumstance in connection with the matter of bail. He stated that unless he had such information, he would be constrained to impose bail. After a short recess, my brother returned before the Commissioner, and in response to his questions, he told him the schools which he had attended and the year of graduation. He also asked him how long he lived at his present address and my brother told him. The Commissioner thereupon released him in his own recognizance.

After the foregoing occurred, my case was called by the Commissioner. Having observed what had occurred, it was apparent to me that unless I provided the Commissioner with similar information, bail would be imposed. This being late Friday afternoon, I also feared that I would be unable to comply with such bail requirements until after the weekend and would accordingly be incarcerated in the meantime. Hence, in response to the questions asked by the Commissioner (which were virtually identical with those addressed to my brother), I disclosed the various schools which I had attended—namely, Lafayette High School, Seth Low Jr. High School and P.S. 247—and the year of graduation.

After disclosing the foregoing information, the Commissioner released me in my own recognizance.

I specifically noticed at the time that I was providing this information to the Commissioner, that Special Agent Corless of the F.B.I., who was sitting in the courtroom, was busily writing down the information.

During the first week in June, 1967, and after the indictment herein was returned, I was shown, for the first time, a certain document signed by Special Agent Corless of the F.B.I., dated February 3, 1967. A copy thereof is annexed hereto as Exhibit B. My present attorney, Henry G. Singer, Esq., has specifically called to my attention the portion thereof wherein it is stated that "an oral statement" had been made "by an attorney representing the defendant Robert I. Toussie to Selective Service personnel that the defendant had not and would not register for the Selective Service."

On and before February 3, 1967, the date of the Corless affidavit, I had been represented in this matter by Arthur N. Fields, Esq., as above noted. At the time the statement in the Corless affidavit was pointed out to me by Mr. Singer, I was not aware that a conversation had taken place between my attorney and Selective Service personnel—if indeed, such a conversation ever did take place, as the Government claims.

But I do not believe that even if a conversation did take place, without my knowledge, between Mr. Fields and Selective Service personnel, that any such statement, as the Government claims, could have been made by Mr. Fields. Mr. Fields' reputation at the bar and his integrity, both personal and professional, are of the highest. It is incredible for the Government to claim that he could have violated the confidential relationship of attorney and client. Further-

more, and without conceding the truth of the statement contained in the Corless affidavit, I categorically state to the Court that I never authorized or gave permission to Mr. Fields to divulge any such information to the Selective Service or any other Agency of the Government—if indeed, such statement was made by him.

(Sworn to by Robert I. Toussie on July 5, 1967.)

Affidavit of Joseph V. Corless for the Issuance of Warrant

(Annexed as Exhibit to Motion)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

T. 50 USC App. §§453 & 462(a)

EASTERN DISTRICT OF NEW YORK, *ss.*:

JOSEPH V. CORLESS, being duly sworn, deposes and says: He is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Upon information and belief, on or about and between the 1st day of January 1961 and the 3rd day of February 1967, both dates being approximate and inclusive, within the Eastern District of New York, and elsewhere, the defendant Robert I. Toussie wilfully and knowingly failed and neglected to perform a duty required of him by the Universal Military Training and Service Act, as amended, the Proclamations of the President of the United States, and the Regulations issued and promulgated pursuant to said Act, by knowingly evading or refusing to present himself and submit to registration by the Selective Service System. (Title 50, U.S.C., App. §§453 and 462(a))

The source of your deponent's information and the grounds for his belief are: (1) a review of Selective Service records which reveal that there is no record of registration by the defendant Robert I. Toussie and (2) an oral statement by an attorney representing the defendant Robert I. Toussie to Selective Service personnel that the defendant had not and would not register for the Selective Service.

WHEREFORE, your deponent respectfully prays that a warrant be issued for the apprehension of the above named defendant Robert I. Toussie that he may be dealt with according to law.

(Sworn to by Joseph V. Corless on February 3, 1967.)

Affidavit of Michael Rosen in Opposition

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, *ss.*:

MICHAEL ROSEN, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney, duly appointed according to law, on the staff of Joseph P. Hoey, United States Attorney for the Eastern District of New York, and as such is familiar with the facts and proceedings heretofore had herein.

2. That this affidavit is submitted in opposition to defendant's motion requesting various types of relief therein. That in the interest of simplicity the Government will state its opposition to the individual requests for relief in the order in which they are presented in the defendant's moving papers.

3. The indictment is not barred by the five year statute of limitations embodied in Title 18, U.S.C., §3282. Before computation of the five years is begun, it must first be ascertained when the offense charged was committed by the defendant. §453 of Title 50, U.S.C., Appendix, provides for the registration of every male citizen of the United States who is between the ages of eighteen and twenty-six. Congress delegated to the President the authority to determine the time, place and manner of such registration. This detail was to be fixed by Presidential proclamation and by rules and regulations promulgated by the Executive.

Congress granted even more sweeping authority to the President by enacting Title 50, U.S.C., Appendix, §460(b)(1). This section authorized the President to prescribe the *necessary* rules and regulations to carry out the provisions of the Universal Military Training and Service Act, hereinafter referred to as "Act", which created the Selective Service System. The constitutionality and validity of the delegation of authority to the President, as embodied in §§453 and 460(b)(1), has been upheld by the Courts.*

That the defendant failed to allege that he was a person exempt from registration or that he did submit to registration, as required by law, reduces the issue herein to one of determining *when* the crime charged was committed.

Presidential Proclamation No. 2799 of July 20, 1948, as supplemented by Presidential Proclamation No. 2942 of August 31, 1951, provided in part that persons born on or after September 19, 1930 shall register on their eighteenth birthday or within five days thereafter.

The Selective Service regulations, embodied in 32 C.F.R., §§1611.1 and 1611.7, proclaimed by Executive Order, pursuant to the authority vested in the President by §460(b)(1) of Title 50, U.S.C., Appendix, provided that the duty of every person subject to registration to present himself for and submit to registration shall continue at all times.

Certainly it is well established that such regulations have the effect of law. Thus, the continuous duty provision is part and parcel of the Act which was established to provide machinery to effectuate the Congressional power to raise armies for the defense of our nation. In other words a man cannot by wilfully and knowingly failing to register

* The relevant case law and other authorities supporting the Government's positions upon this motion will be set forth in the accompanying memorandum of law.

within five days of his eighteenth birthday imperviously shed the mantle of obligation which his nation places upon his shoulders. He remains under an obligation imposed by law to submit to registration. Such person, while continuing his wilful evasion of the registration requirement, continues to violate the law.

Therefore, the offense of wilfully and knowingly failing to register continues, as the duty continues, and the bar of Title 18, U.S.C., §3282 does not aid defendant in avoiding prosecution therefor. We submit that the "continuous duty" provision of the regulations has "otherwise expressly" so "provided . . ."

4. The continuing duty to register does not violate defendant's privilege against self-incrimination, as secured by the Fifth Amendment. We must distinguish between a duty to register and a compulsion to register**. The Government is not compelling the defendant to do anything. In this case he is being prosecuted for his wilful failure to register.

Consequently, the mere act of registration at a time subsequent to an individual's eighteenth birthday (plus five days) is not "tantamount to an admission of criminal culpability for having failed to register at any time prior thereto".

Section 462(a) of Title 50, U.S.C., Appendix, which specifies offenses under the Act, makes it a crime to "knowingly fail or neglect to perform a duty required under said Act by "knowingly" evading or refusing registration. *Mens rea* is specifically written into the law. The subse-

** Webster defines compulsion as the "act of compelling or state of being compelled; subjection to force" and duty as "that which is required by one's station or occupation". Webster's New Collegiate Dictionary, 1961 Edition.

quent bare mechanical act of registration does not couch an admission of a prior criminal intent to violate the law. It is absurd to argue, for example, that a young man who had been ill on his eighteenth birthday and unaware of time for several days or weeks is admitting to a crime when he later recovers and performs his duty of registration. Such a person has fulfilled a duty imposed by law—he was not compelled to do so by anyone or anything, except perhaps his own conscience.

Certain cases relied upon by defendant involving the Communist Party, wagering stamps and firearms registration statutes are discussed in the Government's memorandum of law.

Finally, defendant's reference to the crime of failing to submit to induction (paragraph 10 of defendant's moving papers) further clouds the issues before this Court. The Court is well aware, as defendant undoubtedly is, that a registrant has the right to seek a deferment or exemption from service on many various factual and legal grounds. If he is found entitled to a deferment, he will be so classified. If not, he will be classified as available for service. Should he desire to do so, he may test his classification in a court of law upon a habeas corpus proceeding. The Government is at a loss to determine how registration "exposes" a person to criminal prosecution for failure to submit to induction. In any event, we maintain, once again, that defendant is not being forced to register by anyone.

5. The complaint of Joseph V. Corless (annexed to defendant's moving papers as "Exhibit B"), clearly establishes probable cause that a crime has been committed and that defendant committed it. Thus, the arrest warrant issued upon said complaint was valid as was the subsequent arrest of the defendant. Although the defendant may have

been searched, as incident to such lawful arrest, he does not allege that any property or evidence was seized as a result of the research. In fact, nothing was obtained from the defendant as a result of such search.

6. There was no invasion of defendant's attorney-client privilege and defendant has not in any way established that his Sixth Amendment right to counsel has been abrogated in any manner.

Not every communication to an attorney is confidential and not every communication from an attorney to a third person is a breach of the attorney-client privilege. It appears that defendant has failed to come to grips with the fact that an attorney's unsolicited communication to a third person would not in any event substantiate his claim to violation of his right to counsel. Both defense counsel and defendant, in their moving papers, deem it "incredible" that a certain reputable attorney could make a statement to the Government, as alleged in the complaint herein. We fail to see why such situation is so incredible. The moving papers are conspicuously barren of any denial that statements were, in fact, communicated to the Government by defendant's attorney.

It must also be noted, and the record will so reveal, that the defendant enjoyed the assistance of counsel from the time of his arraignment until this day. As a matter of fact, defendant was represented by counsel at the time of his arrest.

7. Once more we maintain that the complaint was sufficient to establish probable cause that a crime had been committed and that defendant had committed it. Such a showing will sustain the sufficiency of the complaint. The evidentiary matter, referred to in paragraphs 15 and 16 of defense counsel's affidavit, are surplusage and are not

required to sustain the complaint. A discussion of probable cause and its meaning is contained in the Government's memorandum of law.

8. The proceeding before the Commissioner was conducted in accordance with Rule 5 of the Federal Rules of Criminal Procedure. Defendant was represented by counsel of his own choice throughout such proceeding. The Commissioner advised the defendant of his right to remain silent and allowed the defendant an opportunity to consult with his attorney. When defendant spoke, he did so of his own accord. Again, defendant seems to confuse a voluntary act with "compulsion".

The innuendo raised by the defendant relative to his appearance before the Commissioner must unequivocally be condemned. This assertion is nothing more than a diversionary tactic calculated to divert attention from the principal issues.

Further, an arraignment is conducted in open court. Anyone can be present. Spectators and reporters usually are present at such a proceeding, and they certainly have the right to make any notes which they desire. It is extremely odd that defendant, while facing the Commissioner, could be in a position to observe exactly what notes were being made by the FBI Agent in the room.

Finally, it is submitted that the Commissioner, when faced with a request for bail, has the power to make inquiry of the defendant concerning certain background and personal information. Defendant could have remained silent but, instead, chose to speak. Surely he has not established that he was *compelled* to give testimony against himself.

9. Defendant attacks the evidence before the Grand Jury, without stating what evidence was presented. There is a

presumption of regularity concerning Grand Jury proceedings and the defendant has failed to overcome such presumption. No evidence or information was seized or received in violation of defendant's constitutional rights, and the indictment is not subject to dismissal on such grounds.

10. Defendant seeks to examine all of the Grand Jury minutes in the hope that by so doing he might find something that may have precluded the finding of the indictment against him. He certainly has not established any right thereto. He did not appear before the Grand Jury so that Rule 16, Federal Rules of Criminal Procedure, has no application.

Further, Rule 6(e), R.R.C.P., concerns matters occurring before the Grand Jury—not testimony or evidence submitted. Such section regulates the proceedings before the Grand Jury, and the defendant has not established that there were any irregularities in such proceedings. We submit that such section cannot be construed as authorizing the inspection of the entire minutes of the Grand Jury.

Allegations which surmise as to the contents of the testimony before a Grand Jury are merely unsupported suspicions and do not warrant an inspection of the minutes. Again, it is to be noted that defendant has failed to show any necessity for such an inspection.

11. Although the defendant moves to suppress "information illegally procured", he failed to utilize Rule 41 Federal Rules of Criminal Procedure, which is the only provision enacted by Congress relevant to a motion to suppress. Defendant's affidavit does not state any issue of fact in support of his application which shows evidence was seized; moreover, illegally seized. It is respectfully submitted that defendant has not alleged facts nor framed issues upon which a motion to suppress should be granted.

Affidavit of Michael Rosen in Opposition

It is further submitted that the arrest of the defendant was based upon sufficient probable cause and was proper and lawful. No evidence was seized from defendant at any time and whatever information was obtained by the Government in this case was not obtained in violation of any of defendant's constitutional rights.

12. The charge that evidence and information was illegally seized rests upon assumption, inferences and belief, and is insufficient to warrant the hearings as requested by defendant. Indeed, defendant's papers are so lacking in support of his request as to prompt the conclusion that the request was made for the sole purpose of gaining a preview of the Government's evidence.

13. The Government does not possess any recorded confessions or recorded statements made by the defendant or by any attorney representing defendant. There is no provision in Rule 16(a) for the disclosure of written memoranda or reports of oral remarks made by a defendant or another. Nor is it provided that statements of other persons are to be subject to discovery and inspection.

14. Defendant seeks the filing of a bill of particulars. His demand is not aimed at obtaining notice of the charge but is an attempt to gain access to the Government files for the purpose of discovering the Government's evidence. This relief is not properly available to defendant under Rule 7(f), Federal Rules of Criminal Procedure.

It is respectfully submitted that the indictment describes the offense charged with sufficient specificity to apprise defendant of the nature of the charge against him and to furnish a basis for a plea of former jeopardy. It must be remembered that defendant is not being charged with any

affirmative act. The indictment clearly sets forth the nature of the charges against him.

With respect to defendant's requests, embodied in paragraph 6. (b)(ii), (c) (1), (iv) and (e) of the Notice of Motion, the Government maintains that the attempt to secure such information is an obvious attempt to limit the Government's proof and is not the proper subject of a bill of particulars.

With respect to the request contained in paragraph 6. (a), the Government maintains that the indictment describes the offense charged with sufficient specificity to enable the defendant to adequately prepare his defense.

With respect to the request contained in paragraph 6(b) (i), it is the Government's contention that defendant was under a continuing duty to register from the date of his eighteenth birthday to the date of the filing of the indictment herein.

With respect to the request contained in paragraph 6(d), the defendant is referred to the pertinent statutes, regulations and proclamations set forth in the Government's memorandum of law.

With respect to the request embodied in paragraph 6(f), the Government opposes such request on the ground that the information sought is not relevant to any aspect of the crime charged in this case.

WHEREFORE, your deponent respectfully requests an order denying each and every part of the instant motion and for such other and further relief as to this Court may seem just and proper.

(Sworn to by Michael Rosen on July , 1967.)

Memorandum and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

67 Cr. 183

UNITED STATES OF AMERICA,

—against—

ROBERT I. TOUSSIE,

Defendant.

67 Cr. 184

UNITED STATES OF AMERICA,

—against—

SAMUEL R. TOUSSIE,

Defendant.

Appearances:

Michael ROSEN, Esq. (JOSEPH P. HOEY, Esq., United States Attorney, of Counsel) for the Government

JACOB HELLER, Esq. (HENRY G. SINGER, Esq., of Counsel) for the Defendants.

DOOLING, *D.J.*

Each of the defendants has been indicted for wilfully failing to perform a duty required of him by The Universal Military Training and Service Act of 1946 by wilfully

evading and refusing registration by the Selective Service System. Robert Toussie is charged with doing so from June 23, 1959, until February 3, 1967, Samuel Toussie is charged with doing so from May 9, 1952, until February 3, 1967. The indictments were returned on May 4, 1967.

Defendants move to dismiss the indictments on various grounds the most substantial of which is that they are barred by the five year statute of limitations of 18 U.S.C. Sec. 3282; it is argued also that if the statute requiring registration (50 U.S.C. App. Sec. 453) is construed as imposing a continuing duty to register, it is invalid under the Fifth Amendment; it is urged that the indictments rest on evidence procured in violation of the Sixth Amendment in that the defendants' Attorney-client privilege was violated, in violation of their Fifth Amendment right not to incriminate themselves, and in violation of their Fourth Amendment rights to be free of unreasonable searches and seizures. Defendants move also to suppress evidence that has allegedly been illegally seized, for an inspection of the Grand Jury minutes, for a discovery of all inculpatory statements and statements made by their former attorney, and for a bill of particulars.

1. The motion to dismiss the indictments as barred by the five year statute of limitations is granted as to the defendant Samuel R. Toussie and denied as to the defentant Robert I. Toussie.

The offense is a continuing one; the man between eighteen and twenty-six does not discharge his duty by failing to register on the day he attains his eighteenth birthday or within five days thereafter; he continues under a duty to present himself for registration as long as he is liable for service in the armed forces, (cf. 32 C.F.R. Sec. 1611.7

(c)), and he is liable from eighteen years six months, until the twenty-sixth anniversary of his birth, (50 U.S.C. App. Sec. 454(a)). Hence, it can not be doubted since *Fogel* v. *United States*, 5th Cir. 1947, 162 F.2d 54, and *United States* v. *Guertler*, 2d Cir. 1945, 147 F.2d 796, 797, that an indictment is timely if found within five years after the last day on which there was a duty to register. The indictment against Robert Toussie is therefore timely if he had not passed the twenty-sixth anniversary of his birth more than five years before the indictment was filed on May 4, 1967. It is inferred that the Government's case is that Robert Toussie was born on June 23, 1941, and attained the age of eighteen on June 23, 1959. If that is so, he attained the age of twenty-six on June 23, 1967 and was still liable to military service and under a duty to register when the indictment was returned.

The situation of Samuel Toussie is different. It is evidently the intention of the Government to show that he was born on May 9, 1934. If so, he became twenty-six on May 9, 1960, and the indictment was not returned against him until nearly seven years after the last day on which he was liable to military service and under a duty to register. *McGregor* v. *United States*, 4th Cir. 1953, 206 F 2d 583 held on comparable facts that an indictment was timely, relying on the "continuing duty" principle established by the *Fogel* case. However, the Court evidently failed to observe that after Fogel's failure to register the law had been amended to extend the period of liability to service until attainment of 65 years, and men up to 65 had been required to register, so that, when indicted, Fogel had been liable to service and under a duty to register within the limitary period. See *Fogel* v. *United States*, *supra*, 162 F. 2d at 56, footnote 5 (Citing the change in the law, the Court said,

"Attainment of the age of forty-five by Fogel after February 16, 1942, would not, therefore have relieved him of his continuing duty to register."); *cf. United States* v. *Guertler, supra,* 147 F.2d at 797. There appears to be no escape from the proposition that the statute of limitations must bar the indictment if, as appears to be the case, it charges a continuing crime that by its nature could not have been committed by Samuel Toussie after May 9, 1960. If the Government intends to prove that Samuel Toussie was born on or after May 4, 1936, then it may move to have the present order set aside.

2. The argument based on the Fifth Amendment is that once a person liable to military service fails to register on time, his later registration is a self-accusatory act which, therefore, he cannot be required to perform. Reliance is placed of course, on *Albertson* v. *Subversive activities Control Board,* 1965, 382 U.S. 70, and on the now-doubtful status of *United States* v. *Kahriger,* 1952, 345 U.S. 27. The argument is invalid. Whether a man has committed a crime or not, as long as he is liable to military service, he is under a duty to register. His registration may possibly facilitate his prosecution, but it is not required in order to advance that purpose nor, indeed, could the occasion of registration be exploited by the clerk supervising the registration to conduct an essentially criminal investigation by inquiring into the registrant's knowledge of his duty and the motivations of his delinquency. So long as the registration inquiries are relevant to and addressed to the proper business of the Selective Service System, the occasion involves only that bare minimum of self-incrimination flowing from self-identification that is inseparable from any continuance as a member of society. Like an accused's compelled appearance at his trial, where he may be seen, recognized,

and condemned by identifying testimony, or an accused person's appearance in a line-up, or a suspect's surrendering a blood sample to be tested for its alcoholic content, the person liable for military service cannot be excused from his compelled presentation of himself and his compelled submission to registration even though adventitiously, and not purposively, it may facilitate his conviction. See *Michener* v. *United States*, 10th Cir. 1950, 184 F. 2d 712 (registrant cannot present self, give information, and require clerk to complete the forms and effect the registration without the registrant's signing any of the forms). While much is made of the matter semantically, the simple facts are that registration is not *in se* self-accusatory, and that delinquency cannot be suffered to create an exemption from the duty to register is there is-and there is- a power to raise an army, Cf. *United States* v. *Sullivan*, 1927, 274 U.S. 259, 263, 264. Whether, if defendants had registered, their registrations could have been used in evidence against them is a different matter altogether. Cf. *Garrity* v. *New Jersey*, 1967, 385 U.S. 493.

3. Defendants state that, at a request of the Federal Bureau of Investigation made to defendants' former attorney Arthur N. Fields, Esq., both defendants met with Special Agent Corless and another agent in Mr. Field's office. The defendants were asked whether they had registered, but they only gave their names and addresses in response. Defendants say that on the next day, Friday, February 3, 1967, they were told that warrants had been issued for their arrests, and that "arrangements were made for (them) to voluntarily surrender to the F.B.I." The defendants went together to the F.B.I. office, submitted to arrest, were finger printed, searched and their possessions listed, and then they went to the United States At-

torney's office in Brooklyn, and then were taken before the Commissioner. The Commissioner defendants say, declined to release them without requiring bail unless they answered questions about the backgrounds including the schools they had attended, their dates of graduation and how long they had lived at their then present addresses. Defendants say that they saw Special Agent Corless making notes of the defendants' answers. Both defendants were then released on their own recognizances. (The Assistant United States Attorney had requested that bail be fixed at $50,000 for each defendant).

The affidavit on which the warrant for arrest issued was made by Special Agent Corless; it asserted as grounds for arrest that review of Selective Service records revee'ed no record of registration by either defendant, and that "an attorney representing" each defendant stated orally "to Selective Service personnel that the defendant has not and would not register for the Selective Service". Each defendant swears that he was "not aware that a conversation had taken place between my attorney and Selective Service personnel" and that "I never authorized or gave permission to Mr. Fields to divulge any such information to the Selective Service or any other Agency of the Government". Both defendants argue that Mr. Fields would not have and, therefore, probably did not make any such statement to the Selective Service personnel.

The Government states, and it is not denied, that defendants were represented by counsel at the time of the arrest, and during the proceedings before the Commissioner. No affidavit by Mr. Fields is presented, and the Government presents no affidavit except that of the Assistant United States Attorney.

It is obvious that the defendants have not registered or the indictments would long since have been dismissed on

the Government's motion. And it is equally obvious that the Government needs no more than the name and address of a delinquent to embark on its inquiry and determine the objective facts. Neither the defendants nor the Government have disclosed what initiated the inquiry that led to the indictments.

If the affidavit of Corless, alleging that defendants' attorney had told Selective Service that defendants had not and would not register, was a correct relation of what he was told (whether or not his informant was correctly reporting what the attorney had said), the affidavit was sufficient to support a warrant of arrest. The statement that a review disclosed the absence of any registration record must be taken as correct in the absence of any showing that there is no means of effective review. The second statement, reciting the alleged statement of the attorney to Selective Service personnel might have been more precise in identifying the personnel, but, given the kind and the circumstances of the case, it sufficed. In the present cases arrest was a prearranged formality, and there is no suggestion that Mr. Fields was ignorant of the content of the affidavit either when the pre-arranged arrest occurred, or when the proceedings before the Commissioner took place.

The statement in Corless's affidavit will not be admissible against defendants at the trial, nor will Corless's testimony about what the Selective Service personnel said. Even the Selective Service personnel will be able to testify to the statement allegedly made by defendants' attorney only if the Government shows that defendants authorized the statement, *Cf. Laird* v. *Air Carrier Engine Service*, 5th Cir. 1959, 263 F. 2d 948, 953; *City of Long Beach* v. *Metcalf*, 9th Cir. 1939, 103 F. 2d 483, 487. The appeal to constitutional considerations is out of place; there is not here any stealthy governmental intrusion into the confidential com-

munications between attorney and client. Contrast *Black* v. *United States*, 1966, 385 U.S. 26; *O'Brien* v. *United States*, 1967, 386 U.S. 345. The question is, remotely and contingently, one over the admissibility of a damaging statement about a fact readily provable in other ways.

While there is uncertainty about the exact extent to which the affidavit underlying a warrant may be challenged after the warrant has been executed where the affidavit, if true, is sufficient to support the warrant, it would appear that one seeking to challenge the affidavit must at minimum show that the affiant was consciously presenting to the Commissioner an affidavit that the affiant knew was false or should clearly have realized was false. Cf. *United States* v. *Pearce*, 7th Cir. 1960, 275 F. 2d 318, 321-322. No such showing is made here, but, at most, there are only assertions that defendants' attorney could not have said what he is said to have said, and, if he did, he was not authorized to say it. That rises only a little, if at all, above speculation.

4. The general attack on the affidavit supporting the warrant emphasizes its failure to name the attorney, give the time and place of his statement, describe the nature of the review of the Selective Service records, and disclose the ag of the defendant. In other circumstances and in cases of other sorts such criticisms might have force, but the offense charged is utterly simple, and the few words used to describe it and to establish probable cause did so adequately.

5. The attack on the arrest and incident search is not supported by the affidavits. To the extent that defendants wish to keep the point alive as a motion to suppress the use in evidence of anything taken from the defendants during the search, and to support it by testimony, the motion

is referred to the Judge to whom the case is assigned for trial.

6. The motion to suppress the information obtained at the proceeding before the Commissioner appears to be devoid of merit. Defendants were represented by counsel, there would have been no difficulty in presenting the point now made to the Commissioner, to the District Court and to the Court of Appeals in rapid succession. The factors relevant on a bail application are well known, and an inquiry into defendants' roots in the community is automatic on any such application. If the proceeding was perverted from its proper end in order to obtain a discovery of evidence useful in the prosecution and useless in determining whether to require bail and, if so, in what amount, then defendants should have objected at that time and to the Commissioner in the first instance. No coercion or duress is shown that would warrant the exclusion from evidence of the Commissioner's record of defendants' admissions, if any were made. If defendants mean to press the point and support it by testimony, then it is referred to the Judge to whom the case is assigned for trial.

7. The motion to inspect the Grand Jury minutes or dismiss the indictment as based on tainted evidence is denied. No ground for an examination of them is advanced.

8. The motion for discovery is granted to the extent of directing disclosure of the text reporting defendants' statements or their attorney's statements as set forth, whether in direct discourse, paraphrase, summary or otherwise, in any document prepared by Government personnel, without disclosing any other parts of the document except its date and the identity of its author.

9. The motion for particulars is misconceived and is denied except as to item (b) (ii) which is granted in substance.

It is, accordingly,

ORDERED that the indictment in 67 Cr. 184 (the case of Samuel R. Toussie) is dismissed on the ground that the indictment was not found within five years after the twenty-sixth anniversary of the defendant's birth and prosecution was barred by 18 U.S.C. Sec. 3282, and all other motions of Samuel R. Toussie are deemed withdrawn; and it is, in 67 Cr. 183, the case of Robert I. Toussie,

ORDERED that the motion to suppress the use in evidence of matter taken from defendant during the search on February 3, 1967, and to suppress and exclude the statements taken from defendant during the bail hearing are referred to the Judge to whom the case is assigned for trial for disposition; and it is further

ORDERED that the Government furnish to defendant Robert I. Toussie within twenty days copies of the matter directed to be disclosed in the paragraph numbered "8" above in lieu of permitting defendant to inspect and copy the documents in which the statements are contained; and it is further

ORDERED that the Government furnish to defendant Robert I. Toussie within twenty days the following particularization of the indictment; the places within the Eastern District of New York, and elsewhere, at which defendant failed and neglected to perform a duty required of defendant by the Universal Military Training and Service Act of 1948, the Presidential Proclamations and the Regulations under the Act by evading and refusing registration by the Selective Service System; and it is further

Memorandum and Order

ORDERED that the motions of Robert I. Toussie to dismiss the indictment, to inspect the Grand Jury minutes, and for a hearing under Rule 12(b)(4) are denied.

Brooklyn, New York
August 30, 1967

J. DOOLING
U.S.D.J.

Defendants' Requests to Charge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—v—

ROBERT I. TOUSSIE,

Defendant

DEFENDANT'S PRELIMINARY REQUESTS TO CHARGE

The Court is respectfully requested to charge as follows:

1. Intent is an essential element of the crime charged in this case.

2. Accordingly, you must find beyond a reasonable doubt that defendant deliberately and knowingly, with intent to violate the law, failed to register.

3. If you find that defendant did not deliberately desire to violate the law, but failed to register because of an earnest and sincere conscientious belief that wars, violence and killing of other people is immoral, and that registration would constitute a form of acquiescence by him in wars, violence and killing of other people, then you must consider the testimony concerning this belief on the issue of the defendant's intent.

4. In order for defendant's conscientious beliefs to have been earnest and sincere, it was not necessary for him to belong to any organization of conscientious objectors, or to subscribe and follow any orthodox religious faith, nor to

have publicly expressed these views before the age of 18.

5. In determining whether defendant's conscientious belief was earnest and sincere, you should consider all facts and circumstances brought to your attention, including his upbringing, family life, his writings, and in particular his proposed valedictory address prepared at the age of 14.

6. If you find that defendant, at the time he was required to register lacked substantial capacity to conform his conduct to the requirements of law, due to mental, emotional and psychological factors attributable to his conscientious belief that war, violence and killing of other people was immoral, then you must consider such testimony on the issue of the defendant's ability to form the intent required by law.

7. If you find that defendant's conscientious belief that war, violence and killing of other people was immoral, constituted an abnormal condition of his mind which substantially affected his mental or emotional processes and substantially impaired his behavior controls so that he could not bring himself to register for the draft, then you must find him not guilty. (See Note 51, p. 622 of *U.S.* v. *Freeman*, 357 F.2d 606 and *McDonald* v. *U.S.*, 312 F.2d 847, 851).

8. Intent cannot always be established by direct proof. Like any other fact, it may be established by circumstantial evidence. The jury is therefore called upon to determine what was in defendant's mind and what purpose motivated him in his course of conduct.

9. One is not guilty of a crime unless he is aware of the existence of all the facts which make his act criminal. (See *U.S.* v. *Crimmins*, 123 F.2d 271).

* * * * *

Defendants' Requests to Charge

15. If you find from the testimony in this case that the defendant held a conscientious and religious belief that the act of registration was only another extension of war, violence and legalized killing, and if you believe that the defendant's failure to register arose from such belief, then you must find the defendant not guilty.

16. If you find that during the time that defendant was required to register he did not or could not register because of mental, emotional and psychological reasons, then you must acquit him.

17. If you believe that the defendant honestly held the convictions that war, violence, military killing or maiming of people, conscription and registration, all violated his basic beliefs and understanding, then you must acquit him.

18. If you find that the failure of the defendant to register was the result of a mental disease or defect because of which he lacked substantial capacity to conform his conduct to the requirements of law, you must acquit him.

19. That in the forum of conscience, each person has a duty to a moral power which is higher than the State. The essence of religion is a belief that in relation to God, each person has duties which are superior to those arising from human relations. (Dissenting opinion of *Chief Justice Hughes in U.S.* v. *Macintosh,* 283 U.S. 605, 633-634).

20. That each person has moral rights which are based upon the ultimate sanctity of his own conscience and that these rights supercede those of any Government or law.

Defendants' Requests to Charge

21. That every person, if he has carefully and introspectively examined a situation and has reached the firm conclusion that a particular law is one which he cannot in good conscience obey, and that this particular law offends his most fundamental personal values, then that person has a moral right to conform his conduct to the dictates of his own conscience.

Respectfully submitted,

HENRY G. SINGER
Attorney for Defendant

Extracts From Transcript of Trial

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

—against—

ROBERT I. TOUSSIE,

Defendant.

United States Courthouse
Brooklyn, New York
September 5, 1968
10:00 a.m.

B e f o r e :

HONORABLE JACOB MISHLER, U.S. D.J.

Appearances:

JOSEPH P. HOEY, ESQ.,
United States Attorney for the
Eastern District of New York,
By:
MICHAEL ROSEN, ESQ.,
Assistant United States Attorney.

HENRY SINGER, ESQ.,
Attorney for Defendant.

GENE RUDOLPH,
Official Court Reporter.

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(2)

The Court: The case on trial, United of America, against Robert I. Toussie.

* * * * *

Mr. Singer: That is all I am concerned with, the fact that your Honor had brought yourself up to date on the subject
(3)
so that I could make my application.

Now, when Judge Dooling wrote his opinion we had, on the Fifth Amendment issue, discussed in our brief, and I know it was mentioned in oral argument, the three cases that were then pending in the United States Supreme Court, or the two cases, the Marchetti and Hanes cases, in which the Fifth Amendment was raised. That was in—I am terribly sorry. I had cited it in Law Addition for myself, but I can give you the Supreme Court decision.

The Court: Unfortunately, I do not have the briefs that were submitted. I do not know what happened to them. Both affidavits state that briefs would be submitted, but they are in the file.

Mr. Singer: I have copies of mine and the Government's, if you want them.

The Court I do not know whether it is pertinent. I would like to hear your argument.
(4)

I know what the problem was, that you are talking about statements made by the defendant before the commissioner in connection with the bail application.

Mr. Singer: No. No, that involves another thing that I was going to take up with you. I am speaking about the question of—there became involved in the question of continuing offenses, and it was our contention originally that

the crime, if any, would have had to be committed on the five days after the 18th birthday; so that anytime after that, any compulsion to register in addition to our argument that the—by statute—the president could not by proclamation extend a statute of limitations or create a crime was quite different than a regulation that any disclosure by anyone after the five days after his 18th birthday was the compelling of information which would have been in violation of the Fifth Amendment.

(5)

The Court: Didn't Judge Dooling decide that?

Mr. Rosen: Yes.

Mr. Singer: He decided it but before—after he decided it the Supreme Court ruled in both the cases that I have just mentioned, in the Marchetti and the Hanes case, both of which were reported in 19 Law Addition; the first one, the Marchetti, at 889, and in the Hanes case, at 923, and in the Grosso case at page—at 906, that the disclosure—that was the gambling cases—that any disclosure which might actually tend to establish evidence of guilt or a chain or link in the chain of evidence was a violation of the Fifth Amendment; so that now we had authorities which did not exist at the time when Judge Dooling decided the motion.

Also this Circuit in U. S. against Chandler at 380 Fed Second 993, and this came down in 1967, changed to some extent this Fifth Amendment rule, and there they said at

(6)

page 998 that the test now was whether the person, meaning the registrant, could reasonably have sensed the peril of prosecution.

So that now if that be true, that any registration after five days after the date of the 18th birthday would in effect have required a person to disclose that he had committed

an offense on the fifth day or by not registering on the fifth day.

Under those circumstances, the statute had to begin to run from the fifth day of the 18th birthday. Quite different —Judge Dooling could only at the time he had it, although he had been called, his attention, to the fact that the three Supreme Court cases certiorari had granted could not have known in advance what the Supreme Court wrote.

The Court: I might say, it was quite predictable.

Mr. Singer Well, it seemed to me that it was quite pre-
(7)
dictable, but, as I say, none of us what they will write or how they will split on an issue.

But apparently—and what I am doing now then in that regard is to point out the effect of these decisions by the Supreme Court and by our Circuit Court and to show how they strengthened the defendant's position with regard to the fact that any registration after the 1st alleged violation which occurred on the fifth day after his 18th birthday would have been a violation of the Fifth Amendment.

Another point in one other subject in that regard, and that was that when Judge Dooling was considering the Selective Service Regulation, more particularly those regulations which come under Section 1613. I think it's 1613.16.

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(9)

Mr. Singer: Judge Dooling in deciding his—he apparently believed that all a man had to do was that if he came to the draft board he did not have to answer any questions. The regulations, 1613.16, which speaks of recalcitrant registrants, that if a registrant refuses to cooperate or is inclined to evade, refuse to answer or answer falsely, the matter

would be immediately returned, immediately reported to the United States District Attorney, and that would mean that the violation of that order to answer by the Clerk of the Board so that he could properly fill out the form was compelling testimony, which would ultimately be used against a defendant.

• • • • •

I am now saying that I am renewing the motion to dismiss upon the ground of the statute of limitations for the reasons that I have urged; first, that the—

(10)

The Court: I think I am bound by Judge Dooling's decision on that; and even if I were not, I would say that I agree with what he said on the time for the commencement of the running of the statute. He in effect said it does not run from

(11)

age 18 years and five days, but rather from the last day that the defendant had the duty to register; to wit, his 26th birthday.

So the action was commenced within that time.

Mr. Singer: All right.

The Court: So if this motion was renewed, the motion is denied.

Mr. Singer: All right. As long as my position is clear.

The Course: Yes.

Mr. Singer: That I have renewed it and I am pointing out at this time the change, of what I believe was the change in the law and the failure to—let's say it was on our part or whatever it was, to appreciate the consequences of this recalcitrant registrant situation.

In that regard I also move to dismiss then, too, upon the ground that the indictment charging any date, which

charges the date between May 9, 1962 and February 3, 1967
(12)
as the dates when—as the time when this alleged crime was said to have been committed does not state facts sufficient to constitute a crime or an offense.

If that be true, then, that the Court—that the regulation—excuse me—that the proclamation of the president declaring that this was a continuing offense, this would mean that the indictment does—may charge perhaps 900 or more violations of law.

If the charges, the one from the—the one from the first date on May 9, 1962, that certainly was barred by the Statute of Limitations.

The Court: I think we accept the concept that there is a continuing duty.

Mr. Singer: If there was a continuing—

The Court: Then I would say that if at anytime during the period there was a continuing duty that when there was a registration he satisfied his obligation.
(13)

Now, that is not the argument made and I know that I have no case law to support what I say, but the thought I had was, and if it were so, would I think meet your argument, every argument you have made, and that is, even if someone is in violation and subsequent to the time he is in violation, he satisfies the duty, he has the defense to the charge originally made.

Then your argument of self-incrimination and all the other arguments you make would fall.

I do not know whether it is followed on the law.

Judge Dooling did not take that position and I have not researched it, and I do not know whether the United States Attorney's office would disagree with me.

Suppose there was a wilful and knowing failure to register

on the 5th day after the 18th birthday and the year later he registered. Would that constitute a defense to the violation
(14)
on the fifth day after the 18th birthday?

Mr. Rosen: No question about it, your Honor.

The Court: It would be a defense?

Mr. Rosen: He wouldn't be prosecuted, your Honor.

The Court: He would be prosecuted? It would not be a defense?

Mr. Rosen: He would never be indicted for it.

The Court: He fulfilled the obligation. It could not be a defense?

Mr. Rosen: That's it. Then it's up to the Selective Service to classify a delinquent—

The Court: I cannot argue against it because I know the basic premise, once a violation is committed, once you commit a crime, there is no way to undo it.

Mr. Singer: Restitution, for example, would be the closest that I can think of.
(15)

The Court: I do not know that restitution is continuing obligation.

However, it is a thought I had and, I say, I have no cases to support the position but it would be very nice to have them. I think it would demolish every argument you have made.

Mr. Singer: If they existed.

Secondly, I might say to you that a failure to file an income tax return, if you filed one later, is not a legal defense.

The Court: I do not know that there is a continuing duty. We are talking about a continuing duty. If there is a continuing duty at some time, the obligation is satisfied.

At any rate, I will assume that my position is incorrect and I will treat your argument as if it were.

Mr. Singer: All right.

Then let the record then indicate that I have renewed all the motions that were made with respect to the Statute of (16)
Limitations and the dismissal of the indictment.

The Court: Yes.

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Mr. Rosen: May I say this, your Honor, in all candor? (17)
He was searched and no draft card was found.

Mr. Singer: Now we come right to the crux of it.

The Court: Do you intend to offer that as evidence of failure to register?

Mr. Rosen: Your Honor, I intend to elicit from the agent who made the search that no draft card was found on his possession.

The Court: So you do intend to offer evidence that no draft card was found?

Mr. Rosen: Yes, your Honor.

The Court: What would that prove?

Mr. Rosen: Well, the regulations provide that failure to possess a draft card is prima facie evidence of failure to register.

The Court: The regulations provide that?

Mr. Rosen: Yes, sir.

The Court: What regulation is that?

Mr. Rosen: You have the record, your Honor.

The Court: Do you know it by number?

Mr. Rosen: Your Honor, I have a trial memorandum which perhaps—setting forth some of the regulations which perhaps I should hand up to the Court and to Mr. Singer at this time.

1617.7, your Honor.

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Colloquy

The Court: So we do have the question. What do you say was unlawfully searched, Mr. Singer?

Mr. Singer: I say that the defendant was produced there by an arrangement between counsel and the—appar-
(19)
ently the FBI. The agreement was that no questions were to be asked of him; that he was purely to present himself to facilitate his appearance before the Commissioner.

There is no consent given in that connection.

The Court: Is it any different than a defendant quietly submitting to arrest on the street?

Mr. Singer: There is a considerable difference.

In the first place—and I can only now speak for myself, that if I sent a man over to an authority to be arrested accompanied by anyone who should be employed by me or a lawyer, I would certainly take every document from the defendant except those that I wanted to have left remaining with him.

The Court: There is no question that the Government would have—the arresting officer would have a right to search if the arrest were valid.
(20)

Mr. Rosen: Yes.

The Court: You say that when a lawyer agrees to submit his client to arrest, that the Government then gives up the right to search?

Mr. Singer: Yes, sir.

The Court: There was no express agreement by the Government to do this; was there?

Mr. Singer: Your Honor, since I was not the lawyer and did not make the arrangements, I cannot make any statements with regard to it.

All I do know is what I am told, that whatever the de-

fendant had in his person he had it there, and whatever he did not have there was by order or direction of his counsel. This occurs regularly.

The Court: Counsel cannot direct him to have a draft card if the law requires him to have a draft card.

Mr. Singer: I would tell him to have nothing in his
(21)
pocket that had anything to do with the matter at all, and have the barest identification. I certainly would.

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(23)

Mr. Rosen: No, sir. Mr. Barnett was.

I can say this to your Honor: in discussing the matter with the arresting agents, nothing to this effect has been mentioned to me. That does not mean that it did not happen. I did, in all honesty, ask the agent whether or not he always searches, because I myself do not know what the exact procedure is by the FBI at all times. I was informed under all circumstances when they take someone into custody they are responsible for that person, not only for that person's safety but their own safety, and they always make a search.

The Court: Whom do you say the arrangements were made with, Mr. Singer, with the arresting officer or with the assistant?

Mr. Singer: Your Honor, I did not make them. The defendant did not make them. They were made by the lawyer. That is the truth of it.

(24)

The Court: May I ask whether you have talked to the lawyer? It is Mr. Arthur Field?

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Mr. Rosen: I subpoenaed him.

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(25)

The Court: There is no sense calling Mr. Field as to any conversations he had with his client, but I assume that there cannot be any objection to what Mr. Field told the FBI agent, the arresting officer or the United States Attorney.

Is Mr. Field present?

Mr. Rosen: Your Honor, I have decided not to call Mr. Field as a witness in the Government's case. I feel that his testimony, perhaps, would be hearsay, perhaps not.

I do not agree that anything that he related to the Selective Service personnel was in violation of the Sixth Amendment. I think, and it is my feeling at this point, that we can prove our case without a conversation between Mr. Field and Colonel Akst.

The Court: The only question I see is the right to the—the failure—to offer evidence on the failure to find a regis-

(26)

tration card at the time of the arrest.

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(27)

The Court: I frankly see no difference between an arrest made pursuant to an agreement and an arrest made after resistant subjugation and displays of violence.

Mr. Rosen: There was warrant here, your Honor.

Mr. Singer: Yes. It is that warrant that we are coming to that—in which—

The Court: I would say if there is no evidence that the

(28)

defendant can offer that specific agreements were made not to search, I would then say that proof that a search was made and no registration card was filed in the light of regulation 1617.1 would be admissible.

Colloquy

Mr. Singer: The defendant's position is that whatever documents he had in his possession were papers he—and without reference to any draft card, because I want to make no misleading statement, even from a purely—purely from—even from the viewpoint, from the ethical viewpoint, which is the best, and this I have been told, that he took with him only the paper—that he had left a number of papers with his lawyer.

The Court: I think that this evidence may be offered to rebut the inference expressed by the failure to carry the draft card under regulation 1617.1. I think it is nothing more.

Sure, you can come in and say, "Of course I had the draft
(29)
card. I didn't have it on me just because my lawyer told me not to."

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(30)

The Court: But I do not understand that argument, Mr. Singer, and I must say, it is only because I think I know the purpose of the complaint, and it is only to evidence some probable cause for holding the defendant. But once the indictment is returned, the Grand Jury said there is probable cause.

Mr. Singer: I see.

The Court: I do not see any reason to go behind the indictment to determine whatever the complaint was adequate and sufficient.

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(31)

Mr. Singer: We get from the bad complaint—or let's put it my may, and I—at this point let me agree with you basi-

cally, if there wasn't this discussion of what occurred when the man went to the FBI agent on the warrant, there would probably—I would have to agree with you, but if you have a warrant which essentially is based on tainted statements which did violate a confidential relationship, I do not care what anybody says, what I say to you was not binding on my client, as a matter of fact. It may be—my actions may be binding on him in an Appellate Court in the choice of the way I try a case or whether I take an objection or an exception or whether I make a request to charge; but certainly not factually.

Now, the warrant being invalid, how could anything that
(32)
occurred as a result of it, which is the arrest, which it now—I am forgetting now, and let me agree with you for the purposes of this discussion that it would make no difference whether the man came there by agreement or he was arrested in the street.

Let's assume now he had been arrested in the street. I certainly would have a right to argue that if he was arrested on the warrant the supporting evidence in the warrant would be inconsequential, if the warrant was no good.

However, let me put it another way. I want to be as frank as I can be within the limitations of my case.

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(33)

The Court: The reason for this discussion is that in the voir dire and in the opening, we should know what is impermissible, and so far I have seen nothing that I would issue cautionary instructions to the assistant on yet. He does not intend to offer any admissions made either by the
(34)
defendant or by his counsel. The only question at this point

is the absence of the draft card upon the search, and I have already indicated that I find nothing objectionable.

However, if during the trial you advance an argument that would preclude such evidence or any other evidence the Government might offer, I certainly should consider at that time.

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(36)

Can we spread on the record the agreements that counsel have entered into?

Mr. Rosen: I read these to Mr. Singer. He has not signed them. I read these to him over the telephone.

Mr. Singer: My client will sign this and I will submit it to your Honor as a record.

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(39)

Mr. Singer: May we hand up and have marked as an exhibit in the case the stipulation which has been signed by the defendant and by me also, which has been corrected in one place to change an address, so that we have agreed as
(40)
to the date of his birth, the places where he resided at and the places where he had other addresses.

The Court: All right.

May this be Government's Exhibit 1?

Mr. Rosen: Yes, sir. I appreciate that.

The Court: Let it be so marked.

(Stipulation marked Government's Exhibit 1.)

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Stipulation Read into Evidence

(44)

(Whereupon, a jury was duly impaneled and sworn by the Court.)

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(62)

Mr. Rosen: This is a stipulation, as I said before, instead of witnesses testifying:

"It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto and with the consent of the defendant: One, that if a call to testify an employee of the New York City Bureau of Statistics would produce birth certificate number 21679 indicating that the defendant Robert I. Toussie was born on June 23, 1941 in Brooklyn, New York.

If witnesses were called it would be established that the Defendant Robert I. Toussie lived at 7308 Bay Parkway, Brooklyn, New York, and later at 2014 East 5th Street, Brooklyn, New York, during the period 1959 to 1967, inclusive.

Furthermore, that the Defendant Robert I. Toussie for business reasons listed 1029 Broadwalk Avenue, Atlantic City, in New Jersey, and 6027, Monitor Place, West New York, New Jersey, as addresses from 1959 to 1967.

(63)

Three. The defendant Robert I. Toussie did not reside at any other address or claim to live at any other address other than those set forth above from 1959 to 1967, inclusive."

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Charles Milne Seymour, III—for Government—Direct

CHARLES MILNE SEYMOUR, III, residing at 501 West 123rd Street, New York, New York, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rosen:

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Q. Mr. Seymour, by whom are you employed? A. By Columbia University and the City of New York.

Q. What is your position with Columbia University? A.
(64)
Assistant registrar in charge of the records division.

Q. What are some of your functions in that position? A. I am in charge of the non-current records of Columbia University, Transcript Division, Student Directory and other related tasks.

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Q. Mr. Seymour, I show you Government's Exhibit number 2 for identification.

Will you tell us what those four cards represent and what they are? A. Yes.

There are four registration cards for two of the schools at Columbia University.

The first card is a registration card for the school of general studies, metriculated, and that is for the autumn
(65)
term of 1966.

The second, third and fourth cards are registration cards for the School of Business, Columbia University for the spring term of 1967, for the autumn term of 1967 and the spring term of 1968.

Q. Now, whose cards are they? A. Cards are of Robert I. Toussie.

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Mr. Singer: There is no question that these are records of Columbia University kept in the regular course of business.

(66)

Three of the papers, the first three of the Exhibit are signed by Mr. Toussie in his handwriting and the fourth is printed in his handwriting. There is no signature on the card.

Mr. Rosen: We offer them in evidence.

Mr. Singer: I object to them as being completely immaterial to the issue that we are trying.

The Court: May I see the cards, please.

Objection overruled.

They may be marked.

The Clerk: Four cards previously marked for identification as Government's Exhibit 2 now admitted into evidence.

(So marked.)

Q. Now, Mr. Seymour, will you tell us how Government's Exhibit 2 was received back at the college? A. You mean during registration?

The Court: Was it delivered personally or was it mailed to the college?

(67)

The Witness: No, the registration has to be done in person by the student and the cards, when he registers, when he completes the registration by paying fees, then the cards are handed into the bursar and

the bursar returns them to the registrar and the
are maintained in the registration office.

Q. Now, how did Mr. Toussie receive those cards? A. Th
cards are normally mailed out in the mail to the studer
or, if it is too late, then he might pick them up from th
office.

Q. Now, when they are mailed out, are they mailed alone
Anything else accompany those cards?

A. No. There are other IBM cards that go with the regi
tration card and there are other information forms whic
are included.

Q. Now, those other information forms, were you worl
ing at Columbia in 1966? A. Yes, sir, I was.

Q. Have you been there since 1966? A. Yes, I have.
(68)

Q. Are you familiar with any of the other forms or card
that are mailed out to a student who is to register?

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A. Yes, sir, your Honor.

The Court: All right.

Q. Now, can you tell us whether the University mai
anything in reference to Selective Service?

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The Witness: Yes.

Q. Are those documents mentioning Selective Servi
mailed to all students or just to men?

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The Witness: Mailed to all students. It is included
(69)
as part of other information.

The Court: Is it just an instruction form?

The Witness: There is an instruction form, yes. There is also another form.

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Q. Mr. Seymour, I show you Government's Exhibit 3 for identification.

Can you identify that for us, please? A. Yes. This is a form that was used for Selective Service purposes which was sent out in 1966.

Q. Used by whom, sir? A. By Columbia University.

The Court: You have no specific information or personal knowledge that this form was mailed to Mr. Toussie, do you?
(70)

The Witness: No, sir, I do not.

The Court: You are saying it is a usual practice of Columbia University to mail this form?

The Witness: Yes.

Q. This form, is it maintained by your office in the ordinary course of its business? A. Yes.

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Q. Is it the ordinary course of business of Columbia to maintain such forms? A. Yes, sir.

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Mr. Singer: I object to it upon the ground that it does not further the inquiry a bit.

Charles Milne Seymour, III—for Government—Cross

(71)

The Court: Objection overruled.

I will allow it.

The Clerk: One card previously marked as Governments Exhibit 3 for identification now offered in evidence.

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Mr. Singer: My objection does not go to the authenticity of these documents, nor do I object to the use of the photostatic copies after they have been seen by the Jury.

My objection is that they are not relevant to the issue and do not further the inquiry into a branch of this case.

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(73)

Q. Now, Mr. Seymour, referring to Government's Exhibit 2 in evidence, will you tell us when Mr. Toussie was in attendance at Columbia University, please?

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A. Yes.

He was in attendance from September 22, 1966 until June of 1968.

Mr. Rosen: I have no further questions at this time.

Cross examination by Mr. Singer:

Q. Now, the form, Exhibit 3 in evidence, this is blank. It is not filled out at all.

Is that right? A. Yes.

Q. It is a sample of what you send out, the University (74)
usually sends out to students? A. Yes.

Q. So that you have no form such as Exhibit 3 which was written on by the defendant? A. No.

Q. And you would then say that there is no record in the University of Mr. Robert Toussie having filled in such paper as appears in the Exhibit, Exhibit 3? A. Yes.

Q. The contrary exists, that he did not, otherwise you would have had it? A. We no longer have copies of these from 1966, of the cards that were filed.

Q. So you do not know whether he filled one out or not? A. No.

Q. There is no way for you to know or not know? A. There is no evidence in our files that we certified him to the draft board.

Q. There is no evidence that he did receive one and what he did with it after he received it? A. No, sir.

(75)

Q. So the record of the University is completely blank on it? A. Yes, sir.

* * * * *

Mr. Singer: I move that Exhibit 3 be stricken from the record.

The Court: No, I charge the Jury that Exhibit 3 is not admitted for the purpose of showing that the Defendant did not fill it out, but rather just for the purpose of showing that there was a practice in the University for sending these forms out to students and they may infer from the practice that this defendant received the form and from that they may determine, and from all the other evidence, whether the failure

to register was done knowingly and with specific intent and that is the only purpose of the form.

(76)

Mr. Singer: To which I respectfully except.

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(78)

Mr. Rosen: Your Honor, before the next witness is called, I think, for the record on part of the Government's direct case, I would ask the Court to take judicial notice of certain statutes and regulations as part of the Government's prima facie case. That would be Title 50, United States Code appendix, Section 453.

The Court: I will read Section 453 of Title 50.

I might say, for the enlightenment of the jury, that in the main our statutory law is codified. It is under Titles. This Title, Title 50, happens to be described as War and National Defense Appendix.

Incidentally, it covered the Selective Service Act.

(79)

It includes it, as well as other statutes.

Section 453 states, "Except as otherwise provided in this Title—" and otherwise provided does not concern the facts of this case—" . . . it shall be the duty of every male citizen of the United States and every other male person now or hereafter in the United States who, on the day or days fixed for the first or any subsequent registration is between the ages of 18 and 26, to present himself for and submit to registration at such time or times and place or places and in such manner as shall be determined by proclamation of the president and the rules and regulations prescribed here under."

That Section was first enacted on June 24, 1948.

On July 20, 1948 the president of the United States, then President Truman, made a proclamation number 2799. The pertinent paragraph says this—and it is

(80)

subdivision J of paragraph 1. I give you these numbers not because I expect you to remember them but, you see, everything is being recorded and it has to be tied in, so this is for the record, at least the description of the paragraph, but this is what's important:

"Persons who shall be born on or after September 19, 1930 shall be registered on the day they attain the 18th anniversary of the day of their birth or within five days thereafter."

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(81)

The Court: All right. I will read 1611.7.

"Responsibility for performance of duty: A, every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith;

"B, every person who on the day or one of the days fixed for registration is required to be registered is personally charged with the duty of presenting himself before the proper officials and submitting to registration;

"C, the duty of every person subject to registration to present himself for and submit to registration

(82)

shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration

before the Local Board in the area where he happens to be."

D is quite unimportant, but I will read the rest of it. I do not think it relates to this case.

"D, persons required to present themselves for and submit to registration shall not be paid for performing such obligation or shall they be paid for travel allowances or expenses."

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(83)

PAUL AKST, having been first duly sworn by the Court, was examined and testified as follows:

• • • • •

Direct Examination by Mr. Rosen:

Q. Colonel, by whom are you employed? A. By the United States Government; more specifically, by the Selective Service System.

Q. What is your position? A. I am the New York City Director of Selective Service.

Q. How long have you been with Selective Service? A. I was appointed as director of this—of Selective Service by the president of the United States in 1955; and prior thereto I was chief of operations since 1948.

Q. How long have you been director? A. Since 1955.

(84)

Q. Are you on active duty at this time? A. Yes, sir.

Q. Can you tell the jury, briefly, what some of your duties as director entail? A. Well, I have 68 local boards under my jurisdiction.

• • • • •

A (Continuing). I have the administrative responsibilities to see that everything is taken care of properly insofar as clerical, procedural and as well as legal propositions are concerned.

From time to time the Local Boards will call upon me for interpretations of regulations, law and memoranda.

Q. Colonel, for background, is New York City given any unique treatment within the Selective Service System? A. Yes.

It's the only city in the United States that's considered to be a state. We are a state for all intents and purposes as
(85)
of 1940.

Q. So, would it be accurate to describe yourself as the state director for New York City? A. I am the state director for the State of New York City.

• • • • •

Q. Do you have a staff at the headquarters? A. Yes. I have a staff of men on active duty and some civil service employees.

Q. Who is in charge of that staff? A. I am.

Q. Colonel, did there come a time when the name Robert I. Toussie was brought to the attention of your headquarters? A. Yes. The first time we heard the name was on December 5, 1966, when the headquarters, my headquarters received an anonymous call.

Mr. Singer: I object to this.

The Court: Strike out everything except that the
(86)
name Robert Toussie came to the attention of the office, and the jury will please disregard it; disregard all else that was said.

Q. Colonel, can you tell us where an individual's registration records would be kept if he registered? A. That would be kept at his Local Board covering the jurisdiction where he might have his residence.

Q. Would there be a record of that registration at any other place? A. There would be a duplicate copy of registration certificate or card at our headquarters.

(87)

Q. You testified that on December 5, 1966 the name was brought to your attention? A. Yes, sir.

Q. All right.

Did your headquarters do anything or communicate at all with this individual by the name of Robert Toussie? A. On that date we made a search of our headquarters locator file card system. That's exactly where we keep the duplicate copies of the registration. We found no Robert Toussie amongst those cards and thereupon, we called the Local Board covering the jurisdiction of the address, which we then knew as 2114, I believe it was, East 5th Street, Brooklyn. Local Board 41. We called Local Board 41 and wanted to know whether or not they had any Robert Toussie, and they said there was none registered.

Q. Subsequent to this, were there any communications via the mails handled by your headquarters? A. Within a matter of two or three days we sent a card to the address known as 2114 East 5th Street, Robert Toussie, asking whether or not he had registered and would he please fill out the card if he did or was not registered.

(88)

Mr. Rosen: May we have this marked for identification, please?

The Clerk: One card marked as Government's Exhibit 4 for identification.

(So marked.)

Q. Colonel Akst, I show you Government Exhibit 4 for identification. Could you identify that for us, please? A. Yes. This is what we call SS form 392, which is Local Board inquiry card, the kind we mailed to the defendant on December 8th, I believe it was, 1966.

Q. Is that card maintained by you in the ordinary course of your business at the headquarters? A. That's right.

Q. Is it the ordinary course of business of the headquarters to maintain cards such as this? A. Yes, sir.

From time to time we have occasion to mail these cards to people we believe never registered.

Mr. Rosen: I would like to offer this in evidence, your Honor.

The Court: Show it to Mr. Singer.

Mr. Singer: This form has nothing on it. It is in blank.

(89)

The Court: It is offered only as the type of form that was mailed.

Mr. Singer: I object to it.

The Court: Is there any showing that this form was mailed to the defendant?

Mr. Rosen: Yes. This exact form, your Honor?

The Court: That is right.

Mr. Rosen: Yes. I believe—

The Court: Did you testify, Colonel, that this was mailed from your office?

The Witness: Yes, sir. If I haven't I will testify now, that it was mailed.

The Court: Are you testifying from memory or do you have records to show that?

The Witness: Within a matter of another eight or ten days after this little incident an attorney came to my office.

The Court: Do not tell us.

The Witness: I am not going to talk about the conversation. And then we again looked at the file, looked through the locator file and then again it was told to me at that time, only a matter of ten days or

(90)

thereabouts, two weeks on the outside, that this card had already been mailed.

The Court: How do you know it was mailed? Did you direct that it be mailed or were there office records that indicated it would be mailed?

The Witness: There were office records as well as on my direction.

The Court: Objection overruled. I will allow it.

The Clerk: One card previously marked as Government Exhibit 4 is now admitted in evidence.

(So marked.)

The Court: Are those office records available? Are they in Court?

Mr. Rosen: I believe Colonel Akst would have it.

The Witness: They are downstairs, I believe, in your office.

Mr. Rosen: We could get them, if your Honor so desires.

The Court: Yes. I think they should be pro-

(91)

duced.

Mr. Rosen: All right.

Mr. Singer: I wanted to point out, your Honor,

Mr. Akst, while he was testifying—if you will look at the stipulation, Government's Exhibit 1, the Colonel said that the paper was mailed to an address 2114 East 5th Street.

The Court: May I have the stipulation?

Mr. Rosen: That's correct, your Honor, it was.

The Court: All right.

Mr. Singer: The addresswhich we have all agreed upon where the defendant lived was at a different number.

The Court: All right. That will be pointed out to the jury.

Mr. Singer: That is why I object to the proof. It must be limited by this particular agreement between us with respect to the address.

The Court: I will allow Mr. Rosen to continue.

(92)

Would your records indicate whether or not the mailing was returned to you?

The Witness: It was never returned Judge. It went to 2114, and a couple of weeks later, or about a month later, January 20, wesent it to the then known address, which was 2014.

The Court: So you sent it twice?

The Witness: Twice, yes, sir.

The Court: I see.

The Witness: It was not returned at 2014 either.

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(93)

(Government's Exhibit 4 being exhibited to the jury.)

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The Court: Suppose you show Colonel Akst the file, and I ask you to extract therefrom—

The Witness: Very well.

The Court: —the document that you say was kept in the regular course of business that was made for this defendant.

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(94)

The Court: Show what you are turning over to Mr. Singer to examine.

Mr. Rosen: Fine.

The Clerk: One page memorandum marked as Government Exhibit 5 for identification, dated August 23, 1968.

(So marked.)

The Court: May I see it?

Is Government's Exhibit 5 for identification a document kept by the Selective Service System in its regular of its business?

The Witness: Yes, sir.

The Court: Are the notations concerning the matters entered at or about the time the transaction is completed?

The Witness: No, sir. This was—on this particular page you will note that the date was August, 1968. This was a consolidation of all the facts contained in

(95)

those papers he has there.

The Court: I see.

So they are the supporting facts for this memorandum.

The Witness: Yes, exactly.

Mr. Rosen: Right.

The Court: Is that what you used to refresh your recollection?

The Witness: Yes, sir.

The Court: Are the supporting documents documents that are kept in the regular course of business of Selective Service?

The Witness: Yes, that's right.

The Court: Suppose you mark the others, the supporting documents, 5A for identification.

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(96)

The Court: Proof of the mailing may be relative to the issue of wilfulness or knowledge, but the proof must be in one of two ways, as I see it. Either the Colonel saw it mailed or it was mailed under his supervision and direction, or there was a business entry.

Now, there is too much in the business documents that is prejudicial.

Mr. Rosen: That is exactly why I asked—

The Court: But at least the supporting documents should be marked and offered to Mr. Singer so that he may cross examine on it.

Mr. Rosen: Exactly, your Honor.

I have been trying, even sometimes almost slipping to keep—this whole thing was conducted dually, with two people in mind, and most of the documents, if not

(97)

all of them, mentioned two people in one paragraph or another. I do not want any other reference other than this defendant on trial to be before anyone.

I think it is highly prejudicial.

The Court: But Colonel Akst said five for identification was a summary of the document.

Mr. Rosen: Yes.

The Court: So obviously that summary is not kept in the regular course of business.

Mr. Rosen: Right.

The Court: Or is it?

Mr. Rosen: Yes.

The Witness: Well, I would say I called my staff together about the time of that writing, just about a month or so ago, and I told them exactly what I had remembered of the case and I asked them what they had remembered, supported by the other written documents that they had in their possession.

The Court: But this is an evidence question. The

(98)

question is whether these summaries are made routinely for all registrants who the selective service system suspects are in default, or whether it was done just in this case?

The Witness: No, it's done routinely.

The Court: Routinely?

The Witness: Yes, sir.

The Court: So then I would find that it is a document made in the regular course of business, the summary is, and that the supporting documents are also maintained in the regular course of the system's business; but they have not been offered so I have nothing before me to rule upon.

I would sustain an objection to the introduction of these documents because there is too much in them that is irrelevant and prejudicial.

Mr. Rosen: Right. I had no intention of offering them, your Honor.

The Court: All right.

(99)

I want to know that there is supported in the record for Colonel Akst's statement that the card was mailed first to 2014 and then to 21—

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The Witness: 2114 and then 2014.

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(100)

The Court: All right. Suppose you spread on the record the proof that is found in the documents kept in the regular course of business that—is the form 392?

The Witness: 392.

The Court: —392 was mailed to this defendant.

Mr. Rosen: Your Honor, I cannot do that without putting in the name Samuel.

The Court: It is not in the hearing of the Jury.

(101)

Mr. Rosen: Oh. At this time?

The Court: Yes.

We can do it either through the witness, or if the documents are self-explanatory, then just read from the documents and give the date and the form number.

Mr. Rosen: This is a United States Government memorandum dated 12/5/66, upon which various entries have been made.

The date 12/8/67, notation F-392 is listed at the very top. The address is listed as 2114 East 5th

Street. On a document dated January 5, 1967, a similar United States Government memorandum, a notation dated January 18, '67, recites that Agent J. Corless called, has been in touch with subject's lawyer. I don't think the rest is pertinent. Advises their address is 2014 East 5th Street, Brooklyn. Suggests another 392 to preclude question of non-receipt.

An entry made 1/18/67, that same day, says, "Send new 392's to 2014 East 5th Street with a

(102)

five day return."

The entry dated 1/20/67, January 20, '67 says "392's mailed for 1/25/67."

Mr. Singer: It does not say where it was mailed. That is the whole point I am getting at.

The Court: Well, I say that from what has been read by Mr. Rosen—

Mr. Rosen: It does say it was mailed. I am sorry.

The Court: —that there was a direction that it be mailed to the new address.

The Witness: Right.

The Court: And it was so mailed.

Now, if you would like to examine outside the hearing of the Jury on the sufficiency incredibility of documents, you can do so now, Mr. Singer.

Of course you may use it any way you want to before the Jury. That we understand, too.

* * * * *

(103)

Mr. Singer: But I say I can, so there is no question about it; but, why should I, if there is no point to the whole thing?

There came a time when the defendant certainly knew he should have registered. Who cares whether it was in December or January of 19—if that's what we are trying to establish, then the rest of it is all—it becomes entirely unnecessary.

The Court: As I understand it, the defendant has virtually conceded, without eliminating the require-

(104)

ment of proving the elements, as said—you said so in your opening, and I think it is your position—first he didn't register; secondly, and I don't think you said it expressly, but I feel that the position of the defendant is that the defendant knew that he was supposed to register, by law.

Mr. Singer: Certainly. Some time before he was indicted.

The Court: Yes, but that because of his upbringing, background and teachings, he couldn't bring himself to do it, and he feels that because of that there is no wilfullness present.

Mr. Singer: That's correct.

The Court: Generally, that's his position; so, I don't think you are seriously contesting this evidence because all it is designed to show, as I understand, is knowledge and wilfullness.

Mr. Rosen: Yes, that's all.

The Court: To show he must have known that he

(105)

had a duty to register and failed or refused to do it.

Mr. Singer: You see, that's what I am getting at. That's why I don't appreciate the necessity for any of the proof in this regard.

The Court: I think at this point that the defendant's position may be routine, but I don't think the

Government can rest its proof because it still has to prove the elements beyond a reasonable doubt.

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(106)

Mr. Singer: I don't see how the testimony has any validity here at all.

It adds nothing to the case.

Now, had the man filed a form and lied about it, had he done anything affirmatively with regard to it, I could understand that that would be a—but the failure to respond to a form, you simply, if he was

(107)

sent five hundred forms and he failed to respond to—

Mr. Boone: I say he did respond, your Honor.

* * * * *

The Court: Do you care to divulge it at this time?

Mr. Boone: Yes, that an attorney appeared and said he was representing Mr. Thomas. No conversations, no nothing.

This was after the first form was mailed out.

(108)

Someone had to receive that, or else Colonel Aloi would not have been contacted by an attorney, and I hope to draw an inference.

The Court: If the defendant concedes that I will sustain objection that an attorney called and said so; but if the defendant refuses to concede it, then I should give the Government the opportunity to prove it.

Mr. Singer: What does it prove?

The Court: What?

Mr. Singer: What does it prove?

The Court: It proves knowledge. It proves wilfullness.

Mr. Singer: Well, let me go back to these papers, if I may.

The first document we looked at—and I think I have a copy of what you have before you—we find an entry that on December 14, 1966, a Mr. Field came to see the Colonel.

Now, that followed the mailing—the alleged mailing of the first notice to the wrong address.

(109)

Now, I find nothing in this paper of anyone calling to see the Colonel after January 18th with respect to to it, so I cannot understand what incidents we are speaking of.

If we are speaking of the incident of December 14, 1966, that's one of those to which I object to.

The Court: I think the Government can prove it two ways, and I think it is a matter of weight, credibility.

First, they sent it to the wrong address, and the lawyer calls and says, "I represent defendant. You sent it to the wrong address."

I think from that the jury may reasonably infer that the defendant received it.

Secondly, proof by the Selective Service System records that was now sent to the right address.

Now, that's proof on direct. You may discredit that.

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(110)

Mr. Rosen: Since the jury is not here, the case started by an anonymous phone call giving the name

(111)

of Mr. Toussie with the wrong address by one digit.

The Court: I see.

Mr. Rosen: Then they discovered just by the telephone directory the right address, and then it was sent out.

The Witness: No. Later on the FBI found the right address.

The Court: Didn't the lawyer say, "You have the wrong address, but there is no question about the receipt—"

The Witness: No.

Mr. Singer: The lawyer advised between the two —it was the FBI who on January 8th furnished the information of a new address.

The Court: I see.

Mr. Singer: That's why I don't see how the visit of the lawyer is at all admissible.

The Court: Well, if a representative calls—

Mr. Singer: Besides these are things that went to two different people.

(112)

The Court: But, certainly, if the defendant called and said, in effect, "I received the form," you would say that that is some proof that he received it?

Mr. Singer: No question about it.

The Court: Now, we have only one step beyond, we have a lawyer calling, and the only question whether a lawyer is authorized—as I understand the law, when a lawyer presents himself and says that he represents a client he is presumed to represent the client.

Mr. Singer: Yes, but he is just presumed to represent; but anything he tells with regard to the matter isn't proof.

Mr. Rosen: I am not offering anything he tells.

Mr. Singer: Of course the fact of his appearance can't be proof because the constitution permits a man to have lawyer, so the fact of the lawyer being there is entirely inconsequential.

(113)

The Court: Well,—

Mr. Singer: You can't—

The Court: I think we are disagreeing on a very material point.

Mr. Singer: Very immaterial, to me.

The Court: The representative shows up in answer to a letter. I would say that's the same as the party showing up.

The only question is whether he had authority, and I think if a lawyer responds instead of the client to a letter, I think you may imply that he is responding with reference to the letter and that the defendant received the letter.

Mr. Singer: So I don't have to repeat it in the presence of the jury, I am going to object to any testimony regarding the appearance of Mr. Fields before the Selective Service System at the time, on August—excuse me, on December 14, 1966.

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(114)

The Court: Yes.

I will then allow the Government to show that after this letter or card was sent that a lawyer appeared at the Selective Service office, if the Government wishes to offer that proof.

Mr. Singer: To which I am—

The Court: (Continuing) Solely for the purpose of showing that the card was received.

Mr. Rosen: That's all, your Honor.

(115)

Mr. Singer: My objection is noted.

The Court: Yes, your objection is noted.

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The Clerk: 11 pages marked as Government's Exhibit 5-A for identification.

(So marked.)

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(116)

Direct Examination by Mr. Rosen (Continued):

Q. Colonel, going back just a bit, when did you say that a card similar to Government's Exhibit 4 was mailed to the defendant? A. That was mailed on December 8, 1966.

That was mailed to 2114 East 5th Street, Brooklyn.

Q. Do you have any record as to whether it was returned by the Post Office? A. It was never returned to us.

Q. Was it ever returned by the addressee? A. No, it was not.

Q. Did there come a time subsequent to the mailing of this form that you received a visit regarding Mr. Toussie? A. Yes, on December 14th.

Q. Who came to see you—? A. An attorney by the name

(117)

of Mr.—

Q. What is it? A. Field.

Q. And did he tell you why he was there—or, for whom was he there?

• • • • •

A. He said he represented the Defendant.

Q. Now, Colonel, did there come a time subsequent to this visit that a second form, a 392 was mailed? A. Yes, on January 18, 1967, just about a month later, after we had asked the FBI to look into the matter which is our usual procedure, we received word from the FBI that we had a wrong address, and the address, rather than being 2114 was 2014 East 5th Street, and we immediately, on January 20th, sent the same kind of form which you see here as Exhibit 4, I believe the number is to the 2014 East 5th Street address, care of the same person.
(118)

Q. Now, was this ever returned by the Post Office? A. This was never returned.

Q. Was it ever returned by the addressee? A. Never returned by the addressee, either.

Q. Who—was the addressee? A. The defendant, Robert Toussie.

Q. Now, Colonel Akst, are you familiar with the regulations concerning registration? A. Yes, I am.

Q. Can you tell the members of the Jury where a young man is supposed to register? A. Well, the law provides that a man should register on his 18th birthday or within five days thereafter at the place he might be at that time, which means that, ordinarily, the man is usually where he is residing, and he should go to the Local Board in the jurisdiction of his residence.

However, were he to be anywhere else in the country at the time, he may register at the nearest Local Board, giving his home address or his permanent home address, and they in turn will send the registration card to me, that is, to my headquarters, and I in turn will send it to the Local Board, covering the jurisdiction of that residence.
(119)

Q. In other words, if a New York man were in Colorado on his 18th birthday, and he registered with a Colorado Board, give his true address, where would the card be sent? A. If he lived at 2014 East 5th Street, it would be sent to me, and I would send it to Local Board 41 covering that particular home.

Q. Now, Colonel, have you made a check of your records in your headquarters concerning Mr. Toussie? A. I have made a check of the locator file system.

Q. When did you make the check last? A. I think it was yesterday.

Q. Is Robert Toussie registered? A. He is not registered.

Q. Have you checked the Local Board covering his address? A. I have checked Local Boards 41 and 38, and the reason it was 38 is because there was another address we had received later on, so I thought I would check both Local Boards, and we had the Clerks at the Local Boards check under my supervision, and no Robert Toussie was registered in either of the Local Boards.

Q. Colonel, does the law provide for treatment for those (120)
who are opposed to participation in the war?

Mr. Singer: This I object to.

The Court: The Jury may be excused.

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(130)

Mr. Singer: I have no objection to either taking judicial notice of every regulation that is called to your attention now, or even after we are through summing up because they exist, and they are the law, except as to those which I have indicated, like

the continuing defense that nobody had the right to make such a regulation, and it was invalid, and it was constitutionally vague and it couldn't exist; but as to any other one, it plays no parts as far as I am concerned in the trial of this matter.

The Court: All right, I will read the regulations.

You may ask Colonel anything else about procedures, or you may ask him to point out the pertinent regulations, and I will take judicial notice and read

(131)

them to the jury.

Mr. Singer: Now, before we call the jury in, I just wanted to strike so as to follow up my objection to the original question, I want to move to strike from the record—I want to make two different motions.

One. I want to move to strike all of the testimony with regard to the sending of either of the two notices; and, second, I want to move to strike, separately, the testimony concerning the visit of Mr. Fields and his claimed representation.

The Court: Motion denied.

Mr. Singer: Upon the ground that I made on the objection.

The Court: Motion denied.

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(132)

The Court: I take judicial notice and I read to you the following regulations, applying to conscientious objector status or classification: 1622.11 entitled Class 1-AO, conscientious objector available for non-combatant military service only.

In class 1-AO shall be placed every registrant who

has been classified in Class 1-A but for the fact that he has been found by reason of religious training and belief to be conscientiously opposed to combatant training and service in the Armed Forces.

Now, 1622.14, Class 1-OA, conscientious objector

(133)

available for civilian work contributing to the maintenance, health, safety or interest.

"In Class 1-OA shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found by reason of religious training, belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in combatant and non-combatant training service in the Armed Forces."

Now, 1622.16, Class 1-W, conscientious objector, performing civilian work contributing to the maintenance of the National Health, safety or interest, A, "In Class 1-W shall be placed any registrant who has entered upon and is performing civilian work contributing to the maintenance of the National health, safety or interest in accordance with the order of the Local Board.

"In Class 1-W shall be placed any registrant who

(134)

subsequent to being ordered by the Local Board to perform civilian work contributing to the maintenance of the National health, safety or interest has been released from such work by the Local Board after satisfactorily performing the work for a period of 24 consecutive months or has been sooner released from such work by the director of Selective Service

under the provisions of Section 1660.21 of this Chapter. Each such registrant shall be identified on all records by following his classification with the abbreviation "REL" and upon attaining an age beyond the maximum age of liability for military service under the provisions of the Selective Service law, all such registrants shall be reclassified in Class VA."

Are there any others?

Mr. Rosen: Except just the Section itself, 45-J of Title 50.

The Court: All right.

(135)

You called my attention to it.

By Mr. Rosen:

Q. Colonel, what body or group gives a classification of 1-O, 1-OA or 1-W? A. The Local Board does.

Q. Who do they have jurisdiction of? A. Of the registrants who are residing in their jurisdiction.

Q. Does the Local Board have jurisdiction over someone who is not registered? A. No, sir.

Mr. Rosen: Nothing further at this time of this witness.

Cross examination by Mr. Singer:

Q. Could you direct me to any regulation which provides relief for a person who is a conscientiously opposed objector to war without registering? A. There is no such regulation.

Q. So that a person who felt that he, the very act of registration was in itself against his conscience, there is

no place for him in the regulations or the law as you understand it? A. There is. He must register.

(136)

Q. He must register? A. He must register.

Q. So that he must submit himself to a Draft Board to determine these issues even though that registration would be against his conscience and his belief?

Is that correct? A. Yes, sir.

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(137)

COLONEL DANIEL LEWIS, residing at 307 East 44th Street, New York City, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Rosen:

Q. By whom are you employed? A. I am a member of the United States Air Force, on active duty and I am more particularly employed by the Selective Service System.

Q. Are you presently assigned to the New York area? A. Yes.

I am under the direction of the Deputy Director of Selective Service and I serve as liason in New York City area.

Q. Now, Colonel, have you made a check or caused a check to be made of the Selective Service Local Boards on Long Island? A. I did.

Q. How many Local Boards are there on Long Island? A. There are six in the two counties in Long Island, six

(138)

Local Boards.

Edward J. Henderson—for Government—Direct

Q. And when was this check made? A. Oh, last Tuesday, August 27.

Q. Is Robert I. Toussie registered at any of the Local Boards on Long Island? A. Robert Toussie is not registered with any of the Local Boards on Long Island.

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(139)

EDWARD J. HENDERSON, residing at 25 North Lenape Avenue, Trenton, New Jersey, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rosen:

Q. Colonel, by whom are you employed? A. I am employed by the United States Army and on duty with the Selective Service System in New Jersey Headquarters.

Q. Now, do you know the numbers of the Local Boards which encompass 1029 Boardwalk, Atlantic City, and 6027 Monitor Place, West New York, New Jersey? A. Yes, I do.

Q. Have you caused a check to be made of those Local Boards? A. I have.

Q. Is Robert I. Toussie registered at those Boards? A. Robert I. Toussie is not registered at those Local Boards.

Q. Have you caused a check to be made of the entire State

(140)

of New Jersey? A. I have.

Q. Is Mr. Toussie registered in any Board of New Jersey? A. Mr. Robert I. Toussie is not registered with any Board in the State of New Jersey.

* * * * *

Joseph V. Corless—for Government—Direct

(141)

JOSEPH V. CORLESS, called as a witness, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Rosen:

Q. Mr. Corless by whom are you employed? A. I am employed by the Federal Bureau of Investigation as a Special Agent.

Q. How long have you been with the Federal Bureau of Investigation? A. I have been with the Federal Bureau of Investigation for over 11 years.

Q. Have you ever met Robert I. Toussie? A. Yes, I have.

Q. Will you tell us when you first met him, please? A. I met Robert I. Toussie on February 2, 1967.

Q. Will you tell us the circumstances under which you made contact with the Defendant? A. Arrangements had been made with Mr. Toussie's attorney for an interview in the attorney's office in New York City.

Q. Did you go to the office of the attorney on that day?

(142)

A. Yes.

Q. Was the attorney present? A. Yes.

Q. Was Mr. Toussie present? A. Yes.

Q. Was anyone else present, as far as from the Federal Bureau of Investigation? A. Yes, another agent by the name of Johnny Joyce was present.

Q. Did you have a conversation, did you speak to Mr. Toussie on February 2, 1967? A. Yes.

At the outset of the interview Mr. Toussie was advised of his rights and he was shown a rights and waiver form setting forth these rights.

He read the form stating that he understood what his

rights were, however, he declined to sign the form on the advice of his attorney.

Mr. Toussie was asked directly if he was presently registered for Selective Service at which time he stated that he had no comment and the interview was terminated.

Q. Did you do anything subsequent to this interview (143)
relating to Mr. Toussie, basically, the next day or shortly thereafter? A. Shortly after the interview discussion was had with the Assistant United States Attorney—

Mr. Singer: I object to this, your Honor.
All of it should be stricken out, anyway.
The Court: The Jury may be excused.

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(146)

Mr. Singer: I move to strike out his testimony as to the advice his lawyer gave.

The Court: I do not think that came in.

Mr. Singer: Yes, it did.

(147)

The Court: The only thing I heard was when it was, when the complaint was read he did not say anything.

Mr. Rosen: We did not even get that far.

Mr. Singer: We had completed the first—well, I will have it read.

Mr. Miele, would you please read the portion that Mr. Singer refers to.

(The Court Reporter thereupon read as directed.)

The Court: It is what occurred at the lawyer's office.

Colloquy

You don't object to the silence on being confronted with the charge?

Mr. Singer: There wasn't any charge at this time. The charge was made later on, after the warrant was given.

The Court: At any rate it is after. The answer that concerns itself with the advice of the lawyer not to sign the waiver of the rights—

Mr. Singer: And not to make any statement.

(148)

The Court: All right.

Anything else you want of this witness?

Mr. Rosen: Are you striking out the part where the agent said, "Have you registered?" the question he asked him?

Mr. Singer: He refused to answer on the advice of his counsel.

The Court: That is the question I refer to. He said that he said nothing.

Do you object to that?

Mr. Singer: Yes.

The Court: I will strike that out, too.

Is there anything you wish to elicit from this witness that concerns the conduct of the Defendant?

Mr. Rosen: That he had no draft card on the search.

The Court: That I will allow as a valid search incident to the arrest and the absence of the draft card will be the basis of the prima facie evidence of

(149)

non-registration as provided in the section.

Is that correct?

Mr. Rosen: That will be it, your Honor.

The Court: And you object to it?

Mr. Singer: I object. I won't state the grounds to it. I have already stated them, your Honor. You will rule and then I will move to strike it out.

The Court: All right.

Call the Jury.

(The Jury entered the Courtroom at 3:40 p.m.)

The Court: On the Defendant's motion, I struck out the testimony of this witness that when he asked the Defendant whether he registered the witness said nothing, and also the testimony that on the advice of his lawyer he refused to sign a waiver-of-rights card.

The Defendant has a perfect right to remain silent

(150)

and no one can compel him to sign a waiver-of-rights card.

I ask you to totally disregard it as if it were not entered into the record of this case, and indeed it no longer is, because it has been expunged. It has been stricken.

Now, proceed.

By Mr. Rosen:

Q. Mr. Corless, subsquent to February 2, 1967, did you see Robert Toussie again? A. Yes.

Q. When was that? A. That was on February 3, 1967.

Q. Were you an arresting officer? A. Yes.

Q. You made the arrest of Mr. Toussie. Is that correct? A. Yes.

Mr. Toussie reported to the New York Office of the FBI.

Q. Will you tell us what you did?

(151)

Did you conduct a search? A. Yes.

Q. Tell us what you found, if anything? A. There was no personal identification with the exception of a business card reflecting the name of Robert Toussie, and the search failed to produce any Selective Service registration card.

The Court: May I have Regulation 1617.1?

Mr. Singer: I object.

I do not know—well, I didn't know he was going to answer it that way.

The Court: Your objection is preserved.

Mr. Singer: I move to strike the answer.

The Court: Motion to strike is denied.

Mr. Rosen: Here is 1617.1, your Honor.

The Court: This Regulation is entitled, "Effect of Failure to Have Unaltered Registration Certificate in Personal Possession."

(152)

I will only read the pertinent portion.

"The failure of any person to have his registration certificate, SSS Form 2, in his personal possession shall be prima facie evidence of his failure to register and prima facie evidence means such evidence as the Jury may infer is the fact in the absence of any other evidence."

Now, you don't have to accept this as the fact, but you may infer that because of his failure to register, if there is no other evidence, that because of his failure to have the registration card that he failed to register.

Mr. Rosen: No further qu-stions of this witness.

Joseph V. Corless—for Government—Cross
Motion for Judgment of Acquittal

Cross examination by Mr. Singer:

Q. This appearance of Mr. Toussie at the FBI office on the second day, February 3rd, this was by arrangement
(153)
with his lawyer? A. That is correct.

Q. So that it was an arrangement made that you wanted to have him in your office and he came there? A. Mr. Fields asked me to notify him that a warrant was issued and that he would make him available and bring him to the New York office.

Q. And he came, accompanied by some lawyer? A. Yes.

Q. Whose name I do not know. A. He reported with a Mr. Alfano.

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(158)

Mr. Singer: All right.

I move for a direct judgment of acquittal upon the grounds, first, of the Statute of Limitations, and in this regard I seek a bit of advice from your Honor.

There are two branches to the law of Statute of Limitations: one is a matter of law and one is a matter of fact.

There are many cases in which I myself have argued the Statute of limitations to a Jury.

(159)

At this point I am not aware of what I am charged with or my client is charged with having committed a crime on a particular date. If I am, I should be required before I make my motion to have your Honor, I do ask your Honor to require the United States Attorney to elect on which date, Court date he says this crime is committed, so that we may be able, I may

be able to present the situation properly from an evidentiary viewpoint.

If, for example, just to show you that I am not concealing anything, and I mean it as best I can state it, there is a considerable amount, there was some considerable amount of evidence of psychiatric disturbance that did not exist back in 1959, the year in which he became eighteen, but there was a considerable amount of psychiatric disturbance in the years of '65 or thereabouts, and it went on for several years, all of which had been brought to my attention, and then

(160)

there was an examination by some psychiatrist called in by Mr. Fields.

I have not talked to the second one, but I have spoken to the first psychiatrist and he very frankly said this man had been terribly disturbed at a particular period of time, he had treated it over a period of time and he had been terribly depressed. There were thoughts of suicide running through his life and much of this has cleared up. And when I finally came to my own thought that he was able to communicate with me and properly prepare a defense, I couldn't do anything else but present it.

What I am confronted with, his psychiatric condition is of the date when all these incidents happened at the office of Mr. Fields or at the time in December of 1967 or 1966, when the postal card was mailed, or in January or in February when he spoke to this FBI Agent.

(161)

That presents quite a difficult problem. I say, under the circumstances, even if it is a continuing offense

it is not an offense that can be committed, the Defendant is entitled at this stage of the trial, he was entitled to it before and we had asked, sir, I think in our motion for a Bill of Particulars, and we do not know what date it is, that the Government will select, to go to the Jury.

The fact that he did not register yesterday, is that the date I have to meet, or two weeks ago?

That is my first problem.

So, to solve it, I am asking your Honor to require the United States Attorney to elect which of the dates in the period set forth in the indictment he selects as the date when an offense was committed.

The Court: What do you say about that, Mr. Rosen?

Mr. Rosen: Well, the indictment, I believe the indictment charges a continuing crime.

(162)

I think it is a continuing crime.

The Court: Do you say by continuing crime it is a single crime that started from the fifth day after his eighteenth birthday to the date of the indictment?

Mr. Rosen: Well, February 3rd.

The Court: February 3rd.

What does "continuing crime" mean?

Mr. Rosen: It is not a crime every day.

Why pick a day as a unit of existence?

The Court: The thing is this: If he committed a different crime every day by failing to register, then he is committing about 200 crimes.

Now, you do not contend that, do you?

Mr. Rosen: No.

The Court: When you say continuing crime, you

say this is one crime that started on June 23, 1959 and extended through the period to February 3, 1967?

Mr. Rosen: That is true, your Honor.

(163)

The Court: If that is the theory and if you are correct, I cannot ask you to elect because it is one crime.

Mr. Rosen: That is the theory we proceed on. It was one crime.

Mr. Singer: If that is so, this is the dilemma I find myself in: If that is so, then at which time does the Statute of Limitation attach? Is it from the first date or is it at the last date or is it at a convenient date, because there are cases—well, Judge Dooling said that an indictment is timely if found within five years after the last day on which there is a duty to register.

Mr. Rosen: Well, the duty to register was yesterday, so then the duty is today and the duty is February 3rd.

The Court: No, the last date of the duty is when he attains the age twenty-six.

Mr. Singer: Well, has he been guilty of another crime since that time?

(164)

Mr. Rosen: Not according to Judge Dooling.

Mr. Singer: It could not be. You see, the very argument itself, by virtue of its own statement, falls.

There has just to be a time, a continuing time. It cannot mean that this goes on forever.

If that were true and if he were tried here today, let us assume he were convicted, does that cover—

The Court: You would be the first to raise the defense of double jeopardy.

Mr. Singer: It wouldn't do me a bit of good, because some Judge could say, and quite properly say, he has been convicted and the duty to register still goes on, though he has committed another offense.

The Court: I have not seen a case on it. I do not think you need to research it, but my guess is that the double jeopardy would be available. He has already been convicted of that crime, if Mr. Rosen's

(165)

theory is correct that a continuing crime starts from the date he is duty-bound to register to the time he registers, to the last day of that, according to Judge Dooling, that he has to fulfill his obligation, which is on his twenty-sixth birthday.

That is the problem, from the beginning to the end.

(166)

Mr. Singer: It is just purely an exercise and thought on the subject.

Let me put it another way. Let's assusme that the Jury acquitted him. They acquitted him of this offense u pto February 3rd. Did he violate now because—

The Court: That is a more difficult question, but I think I would have to be consistent and say that—

Mr. Singer: You have to be consistent.

The Court: —he need not.

Mr. Singer: Let me tell you—

The Court: It is an illogical result, but I would say that that would have to follow.

* * * * *

(167)

The Court: This is difficult enough, but if Mr. Rosen is right, and I am inclined to agree with him

—we talk about continuing duty. We have said it in the law. I really do not know what it means, but I think it means when one has a continuing duty he

(168)

does not commit a crime every day or every moment of the day that he fails to fulfill his duty. It means that it is one crime over the period.

Now, if you accept that, then there is no choice. It would be splitting, it would be taking out a part of the crime. I am inclined to agree with Mr. Rosen. I think it is the only logical interpretation.

Now, the variations that you suggest do pose problems, I would say that. I am glad I do not have the question right now, that if there was a conviction or an acquittal, that a subsequent proceeding would offer the defense of double jeopardy. It would have to be consistent.

Mr. Singer: But, again, as I say, we get into this—

The Court: I am wishing the result?

Mr. Singer: Get the mental gymnastics.

(169)

Well, I assume then, from what your Honor said, that you deny my application to compel an election?

The Court: Yes.

Mr. Singer: To which I respectively except.

I now move then directly to take out of the case any actions prior to five days—five years from the date of the indictment upon the ground that nothing that occurred prior to the five years from the date of the return of the indictment is within the Jury's right to contemplate in this case.

The Court: Motion denied.

Mr. Singer: I am going to except to your Honor's rulings in these regards.

I renew all of the motions that were made in writing with respect to the Statute of Limitations as if they were urged in full here and adding to those motions the grounds that I raised this morning with respect to the changes in the law of the Fifth Amendment provisions with regard to the fact that if you

(170)

did register and you would be admitting—be compelled to admit the commission of another—of a crime previously committed.

The Court: The motion is denied for the reason stated by Judge Dooling.

Mr. Singer: I then move for a directed judgment of acquittal upon the ground that the Statute itself is vague and indefinite, and upon the ground that the President of the United States—and this applies to both Presidential Proclamations, the original one and the one supplemented by the one of President Johnson's—did not and could not have the force of extending the Statute. Congress had not declared this to be a continuing crime; that the President might have every right to provide by a regulation that the failure to do something is a crime, and if those were later published and properly carried forth, they might create a crime, but he could not

(171)

declare that a crime which the Legislature did not declare a crime. Nobody declared this a continuing offense. Every other Statute of Limitations that exists in the books exists by statutory fiat, adopted by both Houses of Congress and approved as the law required, and this stands completely alone.

There is nothing in the act itself which gave the

President, any President, the power to declare an act a continuing crime or to extend its implications, other than the regular Statute of Limitations, which in this case was five years.

The Court: That motion is in all respects denied.

Mr. Singer: I now move for a directed judgment of acquittal upon the ground that the Government has failed to establish the essential allegations of the offense.

(172)

In this connection, I ask your Honor purely to consider, basically to consider that it has now been established from the testimony of Col. Axe, by your Honor's reading of the regulations, to which I had no objections, the regulations concerning conscientous objectors, that the law leaves no place for that person who, by reason of religious or moral scruples and who feels that it is wrong to submit himself to the military through the conscription and registration process, that there is no place for him to register his protest. He has no place to do it.

He must first submit himself to the military, rely upon whatever regulations they have in his regard. What I am doing is asking the Court in this application to do in essence what the Supreme Court did when it first held that conscientous objectors were only those who were members of organized religions.

(173)

Then, secondly, when the case of the agnostic came before the Supreme Court, a modern thought required them to extend it to an agnostic.

Then, the next point that came before the Court was a person, like in the Seeger case, who had no formal religious background but a general thought

of the Supreme Being. The Supreme Court extended the conscientous objector theory to that point.

I say now the time has come, if we are to follow the reasoning of the Courts, that Congress or no one could put a limitation on a people's belief and their action in regard to those beliefs and that, therefore, a person who have a conscientous belief, a deep feeling in which he could convince a Jury was true and accurate, that he had—he had every—and there was no place in the law which gave him a right to do this without subjecting himself to military discipline, even by virtue of registration, that we ought to ex-

(174)

tend it to a case where a conscientous objector believes that registration in itself is basically immoral and should not be permitted—forced on him.

In this regard, I say the Government has failed to establish the allegations of the indictment and the Defendant—a directed judgment of acquittal should be granted.

The Court: Well, of course, there is nothing in the case at this point that supports the contention that it was contrary to his strong personal belief to register.

Therefore, on that alone, I would deny it. But that only means that we will postpone the day of reckoning on that question for the end of the case.

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(179)

September 6, 1968
11:00 o'clock A.M.

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(180)

The Court: Yes.

Let the record show that Mr. Singer expressly took exception to the rulings on the motions at the end of the Government's case.

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(181)

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DR. SAMUEL V. DUNKELL, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

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Direct Examination by Mr. Singer:

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(182)

Q. What is your profession? A. Psychiatry.

Q. What schools did you attend? A. I attended the University of Zurich Medical School in Switzerland. Thereafter versity of Zurich Medical School in Switzerland. Thereafter, I did an internship at Kings County Hospital. I then did three years of psychiatric residency at Mt. Sinai Hospital and Manhattan State Hospital, and at present I am the director of psychiatry at the Post Graduate Center for Mental Health.

Q. For how many years have you practiced in the specialty of psychiatry? A. 16 years.

Q. During that period of time, have you testified in Courts? A. Yes, I have, sir.

Q. On many occasions? A. A few, I would say.

Q. Today I think you said you were the director of psychiatry for the Post Graduate Center for Mental Health at 124 East 28th Street; is that correct? A. That's correct, sir.

Q. Do you know Mr. Robert Toussie? A. Yes, sir.

(183)

Q. Some time in 1967, did an attorney whose name is Mr. Fields refer Mr. Toussie to you? A. Yes, sir.

Q. Did you see Mr. Robert Toussie professionally? A. Yes. I saw Mr. Toussie for four visits in order to write a consultative opinion on his case at that time.

Q. Can you tell me the months in which these visits occurred? A. I looked at my records last night. I saw him on January 26, 1967.

Q. That was the first time? A. The first visit. The last time I saw him was February 13, 1967.

Q. In between you saw him two other times? A. I saw him two other times in between.

Q. When you saw—first let me ask you this: as a result of your examination and study of Mr. Toussie, are you able to express an opinion first on the subject of whether he was suffering at the time that you saw him from any mental disease or defect? A. Mr. Toussie was suffering at that time from a chronic anxiety neurosis, which had specific

(184)

symptoms, which he gave to me upon my interview with him.

He complained of discussion—of depression, rather—I'm sorry—with anxiety. He couldn't get up. He had had bad depression actually for a number of years. It actually had been getting worse at the time. He was unable to eat; unable

to sleep. He had occasional suicide thoughts. He had nightmares which he had had in the past, but which had begun to recur excessively and showed other symptoms which were characteristic of these states of depression and anxiety.

Q. Are you able to form an opinion from your examinations of Mr. Toussie as to whether or not, with regard to his failure to register for the draft, as to whether or not the course of the mental disease that you mentioned or defect, whether or not he was able to conform his conduct with the requirements of the law which require registration?

Mr. Rosen: I object.

The Court: I will sustain it as to form.

First I would like you to ask whether the doctor considers what he finds a mental disease or defect.

(185)

Mr. Singer: Oh, certainly.

Q. Do you consider what you have reported to us as a mental disease or defect? A. Yes, sir.

This is a standard symptomatic category in the medical literature, a chronic anxiety reaction with depression.

The Court: Then the next, if you please, Mr. Singer, whether he had an opinion.

Mr. Singer: Excuse me?

The Court: Then the next question, not what his opinion is, but whether he has an opinion.

Q. Do you have an opinion that you can state with regard to the defendant's ability to conform to the requirement of the law which compelled registration for the draft? A. I wonder if I can—

The Court: Can you answer that question in the form put?

Mr. Rosen: May I object to that question and state the grounds, please?

The Court: The Jury may be excused.

(186)

(The following occurred in the absence of the Jury.)

The Court: What do you say is wrong with that?

Mr. Rosen: Your Honor, the witness has testified that he first met Mr. Toussie in January of 1967. The case on trial here involves events happening from January, 1959 through—

The Court: I think the objection is well taken. Whether he had the mental capacity—

Mr. Singer: I beg your Honor's pardon?

The Court: —at anytime.

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(189)

The Court: Well, he testified that he has an opinion he can express with reasonable medical certainty that the incapacity related back to the date of the registration?

Mr. Singer: I cannot and I do not know.

The Court: Well, I will ask the doctor.

Can you express this opinion?

The Witness: Yes. I think that that's true because—

The Court: Then I have no problem. Then I will allow it.

Mr. Singer: All right.

The Court: Because you lose either way. If he can relate his examination back in the findings he made to the condition as of the date he was required to register, then that meets the objection that you expressed and concurred it.

Mr. Rosen: Yes, your Honor.

(190)

The Court: There was a further argument I had as a reserve; and that is, that even if he could not say it with definiteness, it is possible that from the other testimony that comes in, Mr. Singer might argue that to the Jury.

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(191)

(The following occurred in the presence of the jury.)

The Court: The Court overruled the Government's objection but counsel is withdrawing that question and he is restating the question.

Direct examination by Mr. Singer (continued):

Q. Doctor, do you have a professional opinion that you can state with reasonable certainty concerning the effect of the mental defect or disease that you spoke of which would have affected the defendant's ability to conform to the requirements of the law of registration from the time that you saw him back to his age 18? A. Yes, sir.

Q. Will you state your opinion, and then I will ask you what you based it on? A. All right. I think this has to be clarified, but my opinion is that, as I stated in my diagnosis, he suffered from a chronic anxiety reaction, which I feel

goes back to the age of four years, which restricted his behavior in life, actually influenced his behavior and determined his behavior. I think that these forces, this situation

(192)

was operating in his life from the age of four onward and, therefore, were operating, I believe, in the period mentioned, 1959, if I remember correctly.

Q. What is your opinion with respect to the defendant's ability to conform to the requirements to the draft law, the registration part of the draft law, at the time I mentioned? A. Yes. I feel that neurotically, on a neurotic basis, the defendant is unable or was unable and still is, I believe, to follow the law that is required in terms of the draft situation, on the basis of a neurotic conflict which he has and which he suffers from. If I can be given a little latitude—

Q. Now, tell what you base this on and give us all your reasons. A. Well, I saw four times and got fairly—fairly complete history on him and have been—actually since you spoke to me yesterday I have been looking at my records and thinking it over.

Perhaps I can start by just reading the original opinion that I wrote when I first saw him.

* * * * *

(194)

The Clerk: Two-page marked as Defendant's Exhibit A for identification.

(So marked.)

A. (Continuing) Well, perhaps to dispense with this complicated report, I can say that Mr. Toussie's troubles actually began at the age of four, with symptoms of nightmares, which aroused him from sleep; with restless sleep and with

an—actually what we call conduct disturbance. As a young man, from the age of four to the date that he gave me of nine to eleven, he in his school work, he had an A in his studies; that is, in his subjects, and had a D in conduct consistently. Was a consistent behavior problem in the classroom and at home.

So that you have a history—he broke things; he was always in arguments; always angry. So you have a history of kind of split between intellectually performing very well and emotionally, in terms of his behavior in society, in the classroom, at home, performing in terms almost like a delinquent, you might say, which he was no social delinquent—was within limits.

Then, interestingly enough—by the way, from my records as a young man he suffered from—he felt inferior. He said (195)

he was a terror. He broke everything. He never slept restfully. He had nightmares from the age of four on, which diminished later on in life, and he had a severe phobia, fear of death, which was created by an incident at the age of three and a half, which I believe is the precipitating incident in his neurosis, where an aunt who had lost her mother used him as a vehicle of her grief over a period of months saying "My mother died, my mother left me," and this young boy, three and a half, actually became phobia because—as a result of this very traumatic situation.

Now, in school, as I said, he had a D in conduct, both what happened very interestingly, which I think bears some relevance to his present plight, is that remarkable, suddenly, at that period, roughly nine to eleven, he changed from a holy terror to a model, to a model student, model boy, model son. He performed a complete switch around.

The reasons for this were twofold. I think that there are certain forces at this stage, namely pre-puberty, nine to eleven, which we call reaction formulations, technically. In other words, while he suffered from an extreme aggressiveness, these forces gradually at this age, because of his school (196)
and socialization, gradually can be utilized to control the aggressivity. But because he was so strongly aggressive, as you can see by his behavior, these reactive forces of what I call the reaction formulation to be a good boy, a good citizen, etc., had to be excessive to control these excessive underlying forces.

Now, he idealized things and naturally since the thing that he was most afraid of was a fear of his own aggressivity coming out, that he would harm somebody or something, and one of his symptoms in childhood was that he was—I will read here. He was afraid of death. He was always afraid. He was afraid of something happening to his parents, for which he would be the blame, and as a result he was afraid to be away from them. He had to sort of keep an eye on them to see that nothing would happen to them. Occasionally thought of suicide, of course, referred to in the latter period I have here.

So he was afraid of his own aggressivity. He was afraid of something happening to those he loved, parents. So in order to contain this he had to really use strong reactive defenses, and as part of the reactive defenses, I believe, this abhorrence of violence was, so to speak, ethical, kind of ab- (197)
horrence of violence became a very significant part of his system of defense and control of himself, and they held, they held pretty much until quite recently, and his late teens, I believe, he had some problems in the family, relating to

a girlfriend whom there was a little bit of loss of control, but then again his defenses arose. He showed some beginning of nightmares and depression at that time.

Depression is a manifestation of rage, which is then turned upon himself—I'm no good—you know, it is turned back upon himself.

So he really began to break with some traumatic episode that took place, say, from about '62 through '65 and through '67, where the stress of being in a traumatic situation, say an argument with an uncle in business, threatened the aggression with coming through. Then of course the counter kind of—counter, shall we say, defense of abhorring violence, being fearful of being put into situations where he might be violent, took over; and, interestingly enough, there is only one situation in which this man was allowed to be aggressive. That was in business, where it was sanctioned, where it was good; you know, this so to speak, went along (198)
with our social ethics, to be an aggressive person, businessman, or at least something that is allowed.

So where it was allowed within social limits to be aggressive, it was all right; but where it wasn't, in other situations, completely reprehensive to him, and he was neurotically frightened of it.

You have to understand that this whole practice goes on automatically and unconsciously, out of control of his will. Therefore, we call it a neurosis. It's not something that he understands. It is not something that he can control. It is in another dimension entirely.

So what he suffers from is a chronic anxiety reaction, which is caused by fear of the back throw of the aggressivity, plus the depression, which is another form of manifestation of aggressiveness, which is turned upon himself, and he has

suffered from this actually since the age of four, with different periods of exacerbation, and I think that this underlying conflict influenced his ethical position in life.

As I understand, when he was a young man in school he took the position against World War II, if I am correct. (199)

A very unpopular position at that time, but this followed out his own kind of idealistic, ethical need to control himself, his own internal kind of a drive.

I think I have given a kind of long complicated explanation, but sometimes it is necessary to do this.

Q. Doctor, would you say, professionally, with any degree of certainty, that the failure to register was a result of what you have told this Jury? A. In my opinion, yes. He had a chronic fear of any aggressive situation, and I think the registration possibility of being drafted was something stimulated by his chronic unconscious reflex.

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(207)

AFTERNOON SESSION

2:00 P. M.

(Whereupon, the Jury entered the Jury Box.)

JOSEPH A. SUTTON, called as a witness, having been first duly sworn by the Judge of the Court, was examined and testified as follows:

The Witness: 1432 East 9th Street, Brooklyn, New York.

Direct examination by Mr. Singer:

Q. Mr. Sutton, what business are you engaged in? A. I am in the textile business, sir.

Joseph A. Sutton—for Defendant—Direct

Q. Where is your place of business? A. 25 West 37th Street, New York.

Q. And for how many years have you been in that business? Over 35 years.

Q. And always in the City of New York? A. Yes, sir.

(208)

Q. Where do you live? A. I live in Brooklyn.

Q. Where? A. In Midwood, I think it is called. Flatbush.

Q. And do you know Robert Toussie who is on trial here? A. Yes, sir.

Q. How many years have you known him? A. I have known him, I guess, since he was born, as a child.

Q. Do you know his father? A. Yes.

Q. You and the father are friends? A. Yes.

Q. Do you know other people who know Mr. Toussie? A. Many people.

Q. Now, with no regard to your religion, are you of Syrian origin? A. Yes.

Q. And is the Syrian community a kind of a close knit community? A. Very close knit.

Q. In Brooklyn. A. Yes, sir.

(209)

Q. Now, over the years, have you been at Mr. Toussie's house? A. Yes, many times.

Q. This young man has been to your home? A. Yes, sir.

Q. And have you been in places other—other places where he was present? A. Well, mostly, at Temple. I have seen him at Temple, but not social gatherings to any extent.

Q. Now, over the years, have you had occasion to discuss with people who know Mr. Toussie, Robert Toussie, his reputation for honesty, for truthfulness and for integrity? A. He is very highly regarded, sir.

Joseph A. Sutton—for Defendant—Cross

Q. No. Tell me, have you discussed it with people? A. Yes, sir.

Q. You are only required to answer certain questions, and it is a limited inquiry? A. Yes, sir.

Q. What is Robert Toussie's reputation among those who know him for honesty, for integrity, and for truthfulness? (210)

A. Well, I say, he is very highly regarded.

He is known to be very industrious, able.

He is known to be a very high minded person, and what particularly seems to strike people is the relationship he has with his father and mother, the special attention he seems to show them.

Q. Well, what is his reputation as to truthfulness? A. His truthfulness is absolutely uncontroverted.

Q. And integrity and honesty? A. Yes, sir, he is very highly regarded.

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(211)

Cross examination by Mr. Rosen:

Q. Mr. Sutton, have you ever done business with either Mr. Toussie or his family? A. No, sir.

Q. Now, will you tell us, sir, under what circumstances you have heard these reports to which you testified? A. Well, Mr. Toussie is a young man, has been particularly successful in developing himself, so much so that it is remarked about.

Q. I am sorry, I didn't hear that. A. I say, he is spoken of because he is so industrious and he has had a—he has shown real ability in his business, and as a result of my knowing the family well, at times, I have had very compli-

mentary remarks passed about him by people who knew that I knew his family.

Q. Can you tell us anyone who told you about his traits; do you know anybody? Name someone who talked about Mr. Toussie, besides his family? A. Yes, sir. These are people not his family, not members of the family. They are people who knew him.

Q. Can you tell me one person who talked to you about
(212)
him? A. More than one. I can think of Ralph Shammock.

Q. And you say he is part of this closely-knit community that you testified about? A. Yes, sir.

Q. Can you think of anyone else who told you about his reputation for honesty, truthfulness and/or integrity? A. I don't think they categorized it, but, generally, they spoke of him very highly as a very fine person.

Q. Well, have you ever heard the community speak as to his honesty? A. I have heard individuals in the community, I haven't heard the community at large speak of his honesty.

Q. Under what circumstances did you hear this? A. Well, particularly in relation to this arrest for this registration, many people expressed very sympathetic remarks, and they said it is a pity that such a fine boy as they know him to be, one who is so high-minded, really is, in general what they said, should be embroiled in these circumstances.

Q. Is he known as a law-abiding citizen in your group? A. There has never been any question as to his being an
(213)
upright person.

Q. I asked you about a law-abiding citizen, sir? A. I don't know how to answer that.

Q. Well, have you heard in this community of which you speak that Mr. Toussie was charged with failing to register

for the draft? A. That appeared in the newspaper. That was—that was what brought it up.

Q. Have you heard whether the people in your community were aware of these charges? A. Some of them were.

Q. And after being aware of this charge, did they still have the same opinion of Mr. Toussie as to his being a law-abiding citizen? A. I can't tell you how they felt about it. I can tell you those who spoke to me about it, and those that did were very sympathetic and thought such a fine young man, was unfortunate for him to be in such circumstances.

Q. Would you say you are an accurate reporter of Mr. Toussie's reputation in the community? A. I don't know what you mean—

Q. You testified as to what the community thinks of Mr. Toussie. A. I didn't say that. I said members of the com-
(214)
munity. I said I couldn't testify as to what the community said.

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(215)

Q. Was Mr. Toussie known as a giant of industry within this group of people, within the community? A. I don't know about giant of industry, I know that he has been thought well of because of his endeavors.

Q. And do these people think he has made quite a success of himself?

• • • • •

A. They have admired his achievements, sir.

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Robert I. Toussie—Defendant—Direct

(218)

ROBERT I. TOUSSIE, residing at 2014 East 5th Street, Brooklyn, New York, having been first duly sworn by the Judge of the Court, was examined and testified as follows:

Direct Examination by Mr. Singer:

* * * * *

Q. Where? What address did your folks live at? A. 7308 Bay Parkway.

(219)

Q. And when were you born? A. June 23, 1941.

Q. Now, did you remain at the Bay Parkway address, or did your family move somewhere else? A. We moved to—

Q. When? A. When I was about 18 years old.

Q. To what—address? A. 2014 East 5th Street, in Brooklyn, New York.

Q. And is that the address at which you live today? A. Yes.

Q. Now, you attended school here in Brooklyn? A. Yes.

Q. What school did you attend? A. P.S. 247 was my elementary school.

Q. And when you completed your studies in elementary school, did you go then on to a junior high school? A. Yes, I went to Seth Low Junior High School.

Q. And when were you graduated from that school? A. In 1955, I believe—

(220)

Q. When you left junior high school, did you go on to another school? A. Yes, to Lafayette High School.

Q. And were you graduated from that school? A. Yes.

Q. In what year? A. 1957.

Q. Now, when did you begin employment, work? A. As a young boy, about nine.

Q. What kind of work did you do? A. Well, at first, I had a little candy business in front of my house, but then I started working for the Brooklyn Eagle, which was a newspaper delivery boy.

Q. What kind of work did you do? A. I delivered newspapers door-to-door.

Q. And how long did you continue doing that work? A. For about three years.

Q. And then what work did you do after that? A. Then I started selling children's clothing, peddling from door-to-door.

I used to go on a bicycle—

• • • • •

(221)

Q. For how many years did you continue to do that? A. For about four years.

Q. Well, were you going to school at the time? A. Yes, I was going to school, and I did this after school.

Q. When you completed high school, did you start doing any other work? A. Yes.

Q. What work was that? A. I started working for my brother, selling children's clothing, wholesale.

Q. How was that done? A. By car.

We had sold to the stores, retail.

Q. And what firm did your brother work for? A. Princess Pat.

Q. Where was their place of business? A. 4416 Dell Avenue, North Bergen, New Jersey.

Q. And how long did you continue in that? A. About seven years—six years, until I was about 23.

(222)

Q. And what year was that? A. In 1964, I believe, about that time.

Q. And at that time did you go into any other business? A. Yes. I had gone into business with my brother and some other men.

Q. What year was that, when was that? A. That was in 1963.

Q. And what was the name of this business that you went into? A. Irving Elias & Company.

Q. What was the nature of the business? A. They manufactured children's clothing.

(223)

Q. Did you continue to work as a salesman for Princess Pat Clothes or— A. Yes.

Q. While you were handling the selling—what was the last name? A. It was until 1964, I worked for Princess Pat, I had done both.

Q. Now, ultimately, this Elias Company, did you sell your interest? A. Yes, we sold our interest.

Q. What year was that? A. January of 1966.

Q. 1966? A. Right.

Q. And in 1966—had you gone to school between the time you left high school, graduated from high school in 1957? A. No.

Q. Did you start to go to school sometime in 1966? A. Yes.

Q. When? A. In the fall of 1966.

Q. And what school did you go to? A. Columbia Uni-

(224)

versity, to the School of General Studies, the undergraduate school.

* * * * *

Q. I show you this paper, Government's Exhibit 2 in evidence. This is a photostatic copy of the Columbia records. Would you look at the first one, please. A. Yes.

Robert I. Toussie—Defendant—Direct

Q. Does that bear your signature? A. Yes.

Q. Did you fill that card out? A. Yes.

Q. Would you look at the second one on the first page—a photostat of another card. A. Yes.

Q. Is that filled out in your handwriting? A. Yes.

Q. Did you sign it; is that your signature? A. Yes.

Q. Now, look at the last or the third photostat of a card; is that in your handwriting, that you filled it out? A. Yes.

(225)

Q. And was that signed by you? A. No.

Q. That bears no signature? A. No signature.

Q. But it is in your handwriting? A. Yes.

Q. Did you fill these three cards out that are represented on the first sheet of Exhibit 2, as part of your registration—A. Yes.

Q. —in Columbia? A. Yes.

Q. Is that correct? A. Yes.

Q. Now, take the second page. Is there a card—is there a photostat on that? A. Yes.

Q. And is that in your handwriting? A. Yes.

Q. And does it bear a signature? A. Yes.

Q. Did you fill that out? A. Yes.

Q. Now, just close the thing.

(226)

Does each one of those cards represent your registration for a specific term? A. Yes.

Q. That's as indicated on the card? A. Yes.

Q. Now, then, at the end of your first six months in Columbia—I will withdraw that.

When you first entered Columbia in the fall of 1966, how were you accepted? A. As a matriculated student in the School of General Studies.

Q. In what? A. The School of General Studies, which is the college level.

Q. The undergraduate? A. Right, undergraduate.

Q. Is that correct? A. Yes, undergraduate.

Q. After the end of that first term, were you shifted or did you apply for admission to any other— A. Yes, after the first term, at the undergraduate school, I had applied for admission into graduate school, and I had been accepted by the graduate school.

Q. And then, have you been attending that school since
(227)
the time you entered in its regular sessions? A. Yes.

Q. And have you registered for this coming term yet? A. Yes, I did.

Q. Now, are you now a regular candidate for a Master's Degree in the Graduate School of Business? A. Yes. I have one more term.

Q. And when, if you did complete your studies, when would you be eligible to receive the Master's Degree? A. In February of this—of 1969, this coming—

Q. In other words, you have this one term? A. One more term, yes.

Q. Now, let me go back, if you will, to the time that you attended Seth Low Junior High School.

Do you remember what occurred with respect to—and I am simply going to mention the incident—

Incidentally, before that—I withdraw that.

You have discussed this mater with me, have you not? A. Yes.

Q. On many occasions? A. Yes.
(228)

Q. Did there come a time when you were about to graduate from Seth Low Junior High School— A. Yes.

Q. And I think that you said that was in what year? A. 1955, June of 1955.

Robert I. Toussie—Defendant—Direct

Q. How old were you at that time? A. Fifteen—fourteen. I am sorry. Fourteen.

Q. And were you selected for any particular purpose? A. Yes.

Q. Tell me what it was? A. Well, they had—the highest honor that you could get if you are a student at the school was—

Q. No, no. You have to—I can't hear you. A. The honor that was considered the highest that a student can get when you were at the school was to graduate as the class valedictorian, and I had been selected to prepare a speech and prepare what I thought to be the farewell address to the students, and what I thought would be—what I thought would be the—the kind of philosophy that I would like to leave the students with and the parents with.

(229)

Q. Now, did you prepare such a draft for such a speech? A. Yes.

Q. Let me show you this paper, is this the paper that you prepared at that time; is it? A. Yes.

Q. Is this writing on it by you, in your handwriting? A. No, that's the teacher's.

Q. And have you kept this since that time? A. Yes.

Mr. Singer: May it be marked for identification, your Honor, and I'd like to show it to—

The Clerk: Four sheets of paper marked as Defendant's Exhibit B for identification.

(Documents marked Defendant's Exhibit B for identification)

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Charge by Court on Intent and Motive

By Mr. Singer:

Q. Now, having submitted Exhibit B for identification, did you submit Exhibit B for identification to your teachers?
(230)
A. Yes.

Q. What occurred then? A. The teachers—

Well, one teacher had acted as a spokesman for the group, and she told me it was the best valedictorian she had ever read, but that unless—the subject was too controversial and unless I changed the—

Excuse me.
(231)

Mr. Rosen: I object.

The Court: Objection sustained.

Mr. Rosen: It is hearsay.

The Court: Strike out the answer, and I'd like to charge the Jury at this point as to the difference between intent and motive and relationship between this type of testimony and the defendant's claim of mental incapacity to commit the act, and I think you ought to be seated, Mr. Singer, because I may be some time.

I will repeat this in the main charge, but I think it is best that you have it in its more appropriate context.

Every crime consists of two components.

First, there's conduct, and the conduct that is proscribed is one of the components of the crime in this case.

The law says that every male reaching the age of 18 and 5 days has a duty to register.

The proscribed conduct is the failure or omission to register.

(232)

The other components of the crime—and every crime—is criminal intent.

It is not alone enough that the Government prove beyond a reasonable doubt that the defendant acted as forbidden, but, further, and as I say, the second component part is that that defendant acted with criminal intent; that he acted voluntarily and knowingly; that he acted with specific intent to violate the law.

Now, specific intent to violate the law does not mean that the Government has to prove that a defendant knew the particular Section and that his conduct was designed solely for the purpose of violating the law.

It just means that he had an awareness that he was acting contrary to law, and that he acted with a specific intention of doing what he did in violation of law.

Now, something has been said about the Defendant's motives, his ideals, his personal convictions.

Now, motive is not one of the essential elements

(233)

of the time, and the Government doesn't have to prove a bad motive, that that was part of the specific intent of the Defendant's acts, they must prove that he acted in violation of law.

Motive means why someone does something, the purpose with which someone does it.

Motive is important as it is on the question of intent.

In other words, the real question is, did the Defendant intend to do what he did with the intention, the specific intention of violating the law?

Charge by Court on Intent and Motive

So, why this Defendant did what he did is only relevant to the issue of intent, criminal intent; but we have still another fact that's introduced into this case, and that is the claim that the Defendant did not have the mental capacity to commit the crime.

The Government must prove beyond a reasonable doubt that the Defendant had the mental capacity to commit the crime.

(234)

Now, I will define that to you at a later time in the main charge, but the important thing at this point is to recognize that some of the evidence as to what this defendant did, for example, at the age of 14 might be significant in determining the issue of mental capacity to commit the crime, but it may not be used by the Defendant to show that he was idealistic, that he did what he did from the highest motives and purposes.

That is no answer to the charge of the Government.

Now, I will finalize what I said and put it in the proper place in the main charge, but I think that at this time you will at least be able to receive the evidence and place it in the proper category. At least, I feel it will be easier to do that.

All right, Mr. Singer.

(235)

Mr. Singer: Perhaps the rest of my discussion ought to be in the absence of the Jury.

The Court: All right, the Jury may be excused.

(The Jury was excused from the Courtroom.)

(The following ensued out of the hearing of the Jury.)

Mr. Singer: Step down. Sit at the table there, Mr. Toussie.

Your Honor, I must first except to your Honor's remarks regarding my defense.

My defense is not exactly the way your Honor put it.

I have made—there are several facets to the defense.

The first is that the defendant because of his moral convictions found himself impossible to register.

Now, to support that contention, we have offered the testimony of the psychiatrist, and your Honor will note that I limited my inquiry of the psychiatrist

(236)

with whether or not as a result of a mental defect he was unable to conform with the requirements of the law.

The Court: Let me state the Court's position there because I will forget what you said, and that's where the distinction is.

I will charge the Jury that it is no answer to the charge that because of his personal moral convictions he could not register, and you have an exception to that.

Mr. Singer: Yes.

The Court: On the other hand, and this is the distinction, if the Defendant did not have the mental capacity to commit the crime and to phrase it in the language of the case, that because of some mental defect, and I say that under Freeman, it must be rooted in some mental defect, whether it is psychiatric, emotional, or physical, if he didn't have the capacity to commit the crime is a defense but not

(236-L)

otherwise, and that's where I draw the distinction, and that's why I gave the charge.

(237)

Mr. Singer: We differ on the word "capacity." I find nothing in the Freeman case or—which has the word—which has the concept of capacity as being the basic principle.

The real theory, as I understand it is, is a Defendant as a result of a mental disorder or defect or disease or defect—

The Court: Let me cite the LIA Code which comes from Freeman.

Mr. Singer: Yes, but—

The Court: A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the compliance of the law.

Mr. Singer: That's all I am concerned, is the second part of it. It is far from being a question of both. You may—this is a—it is not a conjunctive matter,

(238)

that you must have both. You may have either.

The Court: Either what?

Mr. Singer: Either the capacity—if you read the last part of it, to—awareness of the crime or the ability to conform your conduct with that required by the law.

The Court: I agree, but we must start with the beginning.

Don't you agree that there must be some medical basis, either physical or psychiatric?

Mr. Singer: There is. So I've said, there is. You and I agree at that point.

The Court: Yes.

Mr. Singer: But beyond that his ability to conform to the requirement of the law is all that I raise.

The Court: We agree then.

Mr. Singer: All right.

The Court: I thought I was pretty clear to the

(239)

Jury in saying that we are not interested in what he did, except as it reflects on some kind of mental disorder which deprives him of the capacity to either be aware that his act was wrongful or to conform to law.

Mr. Singer: Well, but that's only part of my defense—

The Court: Yes.

Mr. Singer: —as I said to you.

Now, that's part of it. But the other part of my defense is based upon this deep rooted feeling that is evidenced from the time he was fourteen in writing. Now, whether it's admissible on one theory or another, the truth of the matter is in order for a Jury to determine either issue, and even if we let it on the medical proof, I am entitled to inquire of a Defendant to establish here, if I can, when the thoughts first originated and what they were.

This very document puts this position, that the first time that I can find any written proof of it, and

(240)

predates—before the 18th birthday. So that, in es-

sence—this supports, in essence, at least the doctor's basis for it and the Jury's own opinion.

Now, your Honor may ultimately rule that none of this is admissible on the issue of intent. I believe it is. I believe that—my concept of all the theories of capacity to commit a crime ultimately comes right—narrows right down to the issue of intent, ability to form an intent.

Now, if he can—if it arises from one issue or another, that's a matter ultimately for the Jury to determine.

The Court: Yes. I do not think we differ widely.

In other words, I say that as long as he had a choice, he had the mental capacity to commit the crime.

However, if the choice was between his ideals and the law, he cannot use his choice, his ideals, and place

(241)

them above the law. He cannot say, "Well, I knew that it was wrong and I had the capacity to make the choice, but I'm an idealist. I didn't believe in registering because in that way I would submit to something that I thought was morally wrong."

I say, that's the law as I understand it. That is why I disagree with the request insofar as it talks about the right to refuse to register because he is a conscientious objector.

I say, he had an absolute duty to register. The only excuse for not registering is because he did not have a choice. It was beyond him. He could not control his emotions.

(242)

Mr. Singer: The doctor said that he had no con-

trol. Whether he believed that or not becomes unimportant. It's really a matter for the Jury.

The Court: That is right.

Mr. Singer: But I am entitled to show what he wrote.

The Court: I do not think that that has been ruled on yet.

Mr. Singer: You ruled it out.

The Court: No, I did not.

Mr. Rosen: That was the hearsay, what the teacher told—

The Court: That is right, what the teacher said about it. We are talking about state of mind.

We are talking about what his mental condition was.

Mr. Singer: All right. Now let's understand it. We are talking about a choice. First, in order—look, all of this strictly is hearsay; even the doctor's testimony is based upon hearsay, and there are exceptions.

(243)

The Court: Surely.

Mr. Singer: This is the type of situation.

Now, in order to—we can arrive at some understanding of the motivation which ultimately results in the diagnosis.

All I wanted for him to say, the testimony that I'm trying to elicit is what the teacher—what choice was he given at that time and what choice did he take at 141

The Court: As long as it is not a symptom or might somehow be related to his medcial condition and/or state of mind, I won't allow it.

Mr. Singer: It is.

The Court: What?

Mr. Singer: Ultimately. It is ultimately.

The Court: Then I will take an offer of proof.

What did the teacher say?

Mr. Singer: The teacher said, "Your draft of this

(244)

valedictorian speech is an excellent one. The subject is controversial. Change it."

The Court: All right.

Mr. Singer: Now, his response was, "I won't change it, and here is the speech that I wouldn't change."

That is exactly—

The Court: How do you say—

Mr. Singer: Let me—

The Court: —that bears on his state of mind or his—

Mr. Singer: Let me tell you. So that we take a boy of 15, and now it's the speech itself that is the answer. It is one of the things that he related to the doctor. So this is one of the—and here we have the concrete evidence, first.

The Court: That has not been ruled on, and I do not know whether objection is going to be taken to it.

Mr. Rosen: I would on one ground—if he can remember what he said. I do not want any self-serving documents. I would object to a self-serving document.

(245)

The Court: No, I do not think this is hearsay. This is an atc. This is a speech he wrote. This is not hearsay. I would overrule the objection.

So we have gotten over one problem.

Mr. Singer: If we have, then we have this before the Jury.

The Court: Right.

Mr. Singer: From this, this is beginning—of all the things that ultimately happen—that put him in the position where the doctor testified as he did. I am saying that purely to meet this—the requirements of that portion of the Freeman case that you believe is the key and essential part of it. Yet at the same time I also will argue to your Honor—and of course I am bound by what you ultimately say—that also is —goes to the heart of the intent question.

The Court: I do not say I would exclude it. I say that I would give a limiting instruction to the Jury.

(246)

Mr. Singer: That is a matter that will come later.

The Court: State of mind is always in issue when we talk about intent. With what state of mind or in what state of mind did the Defendant act. But I think the Jury is entitled to know that even if he believed everything that was in the paper, even if he acted from the highest ideals and that he was highly motivated, if he has the mental capacity, if he had the choice and he did what he did wilfully, then he is guilty. It is no answer that he thought he was doing something mightier and better than the law. That is all I have tried to tell the Jury.

Mr. Singer: Really, I appreciate and believe me, I understand what you are saying. My objection to it is that as the—as your position on the law, it represents your position and the ruling you are ultimately going to make and you are making now. But I feel

(247)

it ought to be extended over into the field of intent. I do not think it is entirely necessary in modern day psychiatry that we even meet the test as laid down in the Freeman rule. Every other case has said the whole thing is one in which words or phrases will not ultimately do it.

Basically—

The Court: I do not think I even disagree there. I do not deny that this is relevant to the issue of intent. As a matter of fact, I charge the Jury even the motive with which he performed the act is important on the question of intent.

But what I say is that motive is not an essential element of the crime. That is all.

Mr. Singer: I do not argue. That I agree with. But sometimes the absence of motive may establish or a motive may establish lack of intent or intents. I do not know ultimately.

You see, all I am concerned with is if I—can get

(248)

the proof in?

The Court: These concepts are very difficult to follow. They are very difficult for me to follow and I thought that at this time I should charge the Jury on what I believe the law to be so that they might easily follow it, and that is the only reason.

Mr. Singer: Well, if I accept your Honor's ruling at this time, I have objected to it but I mean, if I—I now want to abide by your ruling, although I have excepted to it. I must—can I go ahead with my inquiry with regard to this document and all the other proof I intend to offer?

Colloquy

The Court: Yes. I will permit any evidence of bizarre or abnormal behavior on the theory that it might substantiate the opinion of the doctor; particularly this is true if this history were given to the doctor.

Now, if there is something in the response he said that you say he said that nevertheless I am going to

(249)

give it this way—

Mr. Singer: All right. I won't give it.

The Court: —or I won't give it at all. Now, what do you say that that behavior—

Mr. Singer: That establishes the very principle that the doctor is trying to say, that given a choice to surrender a thing it's abnormal, he says, for any person to do it. That's the only way I can rationalize it.

The Court: Frankly, I think it is stretching it but I am going to allow it. I do not know where the bounds of—

Mr. Singer: I wish I knew.

The Court: —psychiatry stands for—it's opinion. I do not know how far back in anyone's life the Jury may reach in order to determine whether he does suffer some kind of emotional imbalance or mental defect, or whatever you might call it. I know that the very reason for Freeman was the undue restric-

(250)

tiveness that I know that the Court felt in placing before the Jury psychiatric evidence under both McNorton and Durham and Judge Kaufman's opinion said that was the reason for it. As long as a Jury knows that this is for the purpose of showing what his psyche is, what his state of mind is, I do not know

that I can draw strict limits on the type of evidence that is offered.

I think you are going to have to argue that, Mr. Rosen, to the Jury. I think the Jury is going to have to be selective because it is difficult to know from behavior the type of behavior and the time. Some psychiatrists believe that our behavior pattern starts before birth, and who am I to argue with the experts? It is a medical question.

I am going to allow it. I am going to allow great liberality. As long as the Jury knows the purpose of the offer, that is all.

(250-A)

Then I think Mr. Singer and myself more or less agree. I do not know whether you want to argue against that.

(251)

Mr. Rosen: The only thing that just came to mind in Mr. Singer's argument is that he is trying to convey to the Jury and to this Court that the Defendant could not act, was powerless, and yet he gives you an example of where he took an affirmative position.

The Court: Listen, you are wasting that argument on me. Use that to the Jury. That is all right.

Mr. Rosen: I understand that, your Honor. But on the question—

The Court: I am sure Mr. Singer is not going to argue your case and I do not think you are going to argue his.

Mr. Rosen: On the question of intent, though, if it is limited to his prior statements and we have argued this in Selective Service cases—

The Court: Is intent the time of the crime? Here we have a continuing crime. We are talking about intent from—

(252)

Mr. Rosen: For nine years or eight years, '59 to '67.

The Court: We are talking about intent over a long period of time. I can state the principle, and just like many theories it is pretty difficult to grasp them and apply them in specific facts. I know that it is the intent at the time, but here you have the problem not of specific acts. You have a problem of a continuing crime. When is the intent formulated? Precisely the day that you say? Well, maybe it was before. I think you are going to argue that it was before the specific day, so why should a Defendant argue that the intent predates his eighteenth birthday plus five days?

Mr. Rosen: Your Honor, the objection was just to the hearsay, basically. I do not think the government will argue against the production of this.

The Court: All right.

(253)

Mr. Singer: Now, one other thing, and I make it on the record.

I had offered to Mr. Rosen at the—when I returned from the lunch recess—I could not get him one the phone during it—that if he wanted any examination of the Defendant over this week end, all he had to do was to let me know and he would be wherever he wanted at any—ready to submit himself to any examination by any psychiatrist that the District Attorney, or the United States Attorney, se-

lected. At any time between now and the beginning of Court Monday morning.

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(254)

Mr. Rosen: My response, for the record, to this offer is it—we may want to accept it, but if the limitation is by Monday morning, and it will be Friday evening very shortly, I do—it may be impossible, even though we would want to do it, by then.

(255)

Mr. Singer: Excuse me. At any time.

• • • • •

(257)

Direct examination by Mr. Singer (continued):

Q. Mr. Toussie, going back to this incident of this validictory speech. Would you tell me what occurred between you and this teacher? A. Yes. The teacher told me that—

Q. Speak up, please. A. The teacher told me that I was selected as class validoctorian, but because the subject of my speech was controversial, that it wasn't a popular conception, that I would have to alter the speech. She said she would give me a day to think about it.

(258)

I went home that day and I thought. I had prepared for three years to be validictorian—I hoped to be—and that if I were going to give the message that I felt the graduating class should keep, they should have, that it would have to be what I sincerely believed.

When I came back, she asked me again if I would change

the context of my speech, and I told her no, that I couldn't.

Q. Were you selected as the valedictorian? A. I never made the speech. I never—

Q. Somebody else made it? A. Somebody else delivered the valedictorian speech.

Mr. Singer: I now offer Exhibit B in evidence.

The Court: Is there any objection?

Mr. Rosen: Yes, your Honor.

The Court: Objection overruled.

Let it be marked.

This is solely for the purpose indicated, as to—

Mr. Rosen: I would like to see it. I have not had a chance to read it.

The Court: Then why did you object to it?

(259)

Mr. Rosen: I objected on the grounds that it is self-serving, if anything, even without seeing it.

The Court: I see. All right.

Let it be marked and then you may read it.

Mr. Rosen: Thank you.

The Court: It is only on the issue of mental capacity to commit the crime, and may reflect on whether he intended, possessed a criminal intent to commit the crime.

The Clerk: Defendant's Exhibit B previously marked for identification, is now admitted into evidence.

(So marked.)

Mr. Singer: If your Honor will permit me to read it, without any emphasis, I will try to do it.

The Court: All right.

Defendant's Exhibit B Read into Evidence

Mr. Singer: I will limit my reading to one part of this matter.

I am reading from that portion of Page 2:

(260)

"So there you are and here we are, a new generation soon to occupy the center of the stage.

"I hope and believe that our generation has been selected by fate to play an earth-shaking role in history. Our generation is going to abolish war from the earth, just as a previous generation abolished small pox and diptheria and the present generation is abolishing polio. And we are going to abolish war, not because we are more ethical than previous generations or more moral or more intelligent, but in the words of President Eisenhower, I quote from his speech of October 19, 1954, 'Since the advent of nuclear weapons seems clear to me that there is no longer any alternative to peace.'

"Let us ponder that for a moment. President Eisenhower, one of the greatest generals of all times, says 'there is no longer any alternative to peace.'

"War has always been brutal, vicious and cruel

(261)

and immoral and destroyed in days what took years to build. It orphaned children and blinded babies. It starved widows and burned infants alive in their cribs. But to primitive peoples, at least it made sense. You kill off your oponent and grab their lands.

"But the recent past wars have become senseless. There is no longer a victor in modern war. To defeat the aggression of Japan we sacrificed the lives of hundreds of thousands of the flower of our manhood,

and then we saddle ourself with the intolerable burden of rebuilding Japan and helping to support the Japanese for the rest of our lives and the lives of our children and the lives of our grandchildren.

"And still our conscience continues to torture us, so a few weeks ago we bring twenty-five girls who have been disfigured by the atom bomb and Hiro-

(262)

shima. We bring them to New York for plastic surgery. Yes, forget the cruelty. Wars have been senseless for many years. And now with the advent of the H bomb, wars threaten the human race with extinction. If any disease—say pneumonia or scarlet fever were suddenly to take such a virulent form, as to threaten the human race with extinction, a way would be found to conquer it.

"And now that war has taken such a virulent form, we are going to find a way to conquor it.

"As General Douglas MacArthur told the American Legion in his speech on January 26th of this year, and I quote, 'The next great advance in the evolution of civilization cannot take place until war is abolished.'

"Some may say, 'Oh, man has always been an aggressive creature and there'll always be wars.'

"I say, 'Yes, there'll always be wars.' There's the

(263)

war against cancer. There's the war against injustice everywhere. There's the war against bitter poverty that makes fully two-thirds of the population hungry for bread right now. There's the war against heart disease, and there's that beautiful, wonderful war

against bigotry. I hope to live a hundred years and to take part in those wars until the day I die."

I have omitted the first page and half of the last, your Honor.

The Court: Yes.

Direct examination by Mr. Singer: (continued)

Q. Now, before you wrote this Exhibit B, had you studied any particular writers? A. Yes.

Q. Who? A. I had studied the works of many. I had studied the works of Albert Einstein.

Q. Speak up. A. Of Albert Einstein; of Sigmund Freud; of Sir John Slessor; Bertrand Russell; of Lord Adrian; of (264)
Sir Philip Joubert; even of ancients, of Laotse and Confucius; and the works of many pacifists.

Q. Now, for example, you said you studied the works of Albert Einstein and Sigmund Freud. Do they have any connection with each other? A. Yes.

Q. What was it particularly in their studies? A. Well, Albert Einstein, when I was a young—young boy, was always considered to be the most brilliant man and everybody somehow compared brilliance with Einstein. They said, "He was another Einstein." And since everybody wanted to grow up and be like these people, I used to read the things that he wrote and the things that he said.

And in 1929, I had—well, when I was in junior high school I had read one of the passages that he had written in 1929, where he said that the hatred of war was in an instinctive feeling within him.

Q. I can't hear you. A. That the hatred of war was instinctive, that he hated it, anything to do with violence, that it was disgusting, that the treatment of men like animals was barbaric. And in the summer of this year he said that, "I
(265)
believe in taking a holy oath never to participate in any act of violence," and when a man like that who had those beliefs, it just—it meant a great deal to me.

And then later on, he was one of the most prominent pacifists and lovers of peace, and he was selected by the League of Nations to—to have a debate or to have some discussion with any man that he selected and on any topic that he selected, and he chose Sigmund Freud, who was considered by many people to be the father of psychology.
(266)

Q. How does Freud come into this? A. Well, he had chosen Sigmund Freud and he—they had—he wrote a letter to Sigmund Freud and he entitled it Why War. He asked Sigmund Freud why wars—why there are wars and why people feel the need for war, and Albert Einstein concluded that within all people there's an instinct for hate and destruction but since he was not—he was brilliant in the physical sciences. He felt that he would ask the men who were supposedly the leading authority on the mental sciences, and he asked Sigmund Freud for his reply as to why there is such a thing as war. And Sigmund Freud replied in the letter to Albert Einstein that—from Albert Einstein, and he said that he believed—he agreed with Albert Einstein, that there is an instinct within man that longs for hate, for destruction and for killing.

He said usually you could control that within a man but it's very easy for the leaders, military leaders to arouse

that and that—that feeling in people. He said that he believes that—that the reason that he and Albert Einstein were such great pacifists and had such a great intolerance for war and violence was that their organic nature, that organically the nature ruled them to be pacifists, that they (267)
had no control—they had no choice but to be anything but lovers of peace and to see to it that man was treated like a human being and treated in a manner that he was created by God.

And he wrote to Einstein that if not any—for any intellectual reason or moral reason, but that he believed that wars were disgusting because every man, every man had a right over his own life and war destroyed lives that were filled with promise and that it made individuals commit acts that would change their manhood, to murder people against their will. It destroyed property. It destroyed in days what took years to build.

And this correspondence continued between the two, and I've always saved those letters.

Q. You mentioned some other men. You mentioned, I think, somebody named Slessor—did you say? A. Yes.

Q. What was there that he said, and who was he? A. He was an Englishman and had tremendous experience with warfare and was probably the leading advisor to the British (268)
Government.

He said that a war in this day and age is general suicide. And he said that it's no longer of any significance to abolish any particular weapon of war, but that what we've got to abolish is war itself.

Q. You mentioned some other writer? A. Lord—

Q. Joubert, I think? A. No.

Mr. Rosen: Your Honor, I am going to object on the record as to writers being mentioned and what writers say, unless there is a foundation laid as to what meaning this had.

The Court: The justification of war is not before the Jury, nor is the justification of the United States policy before the Jury and you are not here to either denounce it or approve it.

This case is United States of America against Robert Toussie. The only reason this is admitted is to show the state of mind of the Defendant, and also to show whether he had the mental capacity to commit the crime, and nothing else.

It is not to show that this Defendant acted from the highest motives. He may have acted from the highest motives but that is no answer to this charge.

Now you may proceed.

Q. Now, then, we—I think you mentioned Lord Adrian. What was there that he said that you mentioned—you mentioned his name before. What was there that he said or wrote? A. I did.

Well, he said that we must give up the ancient European beliefs of warfare or the human race will become extinct.

Q. How old were you when you were reading this? A. 12, 11, 14, and then later on also. I always—

Q. Tell me about— A. But—

Q. You called him Joubert. Who was he? A. He was the Air Chief Marshal, and he said that he was—also he had a

great deal of experience and the reason these were so significant to me were because all these men were—these were men in the military who had such great experience with war-
(270)
fare, who had seen men being killed and had seen the promises that were being made, and they came out and spoke against war.

He said that it could no longer continue and he said that either we put an end to war or we put an end to the human race. And at the same time was when Eisenhower and—who was president of the United States and perhaps—who—was considered to be such a substantial general, said that since there is no longer any alternative to peace, that it just seemed that this was the natural thing, that there just had to be peace when men like this were saying that there could be no more wars, that that's it.

You have to recognize that that's the condition of the world today, that war would just be suicide.

Q. Well, tell me, how did this fit in with the idea of conscription for war? What were your opinions in those days about it? A. I had concluded that since these men had said that might cannot either logic, morality or reason make right, that I had resolved myself to believe that I couldn't have anything to do with any kind—anything that would assist in war, and that regardless of what anybody told me or anybody said, that I just couldn't compromise and assist
(271)
in any way. And that conscription—to me you couldn't separate conscription, war, dictatorship, war-making machine; they were all linked together; that it was impossible to say which one was the beast, or which one was the instrument of the beast or the mark of the beast; that if the—if

the state by decree had the right to create millions of soldiers, then it would be held as so that the state has the right, the sovereign right over all individuals and all the property and then the state would presume to decide what's right and what is wrong; and that the—we would have then the stateism and then we would have what would be the—dictatorship, that the rights of the individual are no longer applicable; that it's just a state that decides.

The law of the state becomes the law that prevails and the laws of God. Thou shalt not kill became meaningless.

Q. How do you equate with this the defense of a country? A. I'm sorry, I don't—

Q. How do you equate your feeling, how did you, with the normal instinct to defend a country, your own country if it was attacked? A. I felt that if my country were attacked I
(272)
would have—I would have nothing at all—I oppose war in all forms and I would have nothing at all to do with any kind of war or anything that woud implement or help the execution of war.
(273)

Q. Did you believe you could live in a vacuum? A. No, but I had realized that—that when I had started becoming acquainted with other pacifists and conscientious objectors and I had seen that they had been considered, they were attacked by many people and they were looked upon—people didn't agree with their ideas and people felt that they were narrow in their attitudes, I just resolved myself that I personally could not—I couldn't live with myself.

I wouldn't be able to look at myself in the morning in the mirror if I—if I in any way violated the dictates of my conscience which were—came to me all through my teach-

ings through life and the commandment of God, thou shalt not kill.

To me if a man plans a murder or the man executes the murder, he's equally guilty. He's considered equally guilty.

Q. Now, you said you became acquainted with conscientious objectors?

Do you know any personally? Or perhaps I misheard you? A. That—

Q. Did you say you became acquainted with conscien-
(274)
tious objectors? A. Yes, I did; mostly through readings, through my—through my exposure that way.

Q. Did you ever participate in any of these—any of the organizations of conscientious objectors? A. No, because I didn't—

Q. Was this the sort of thing that you just were talking to yourself about? A. Yes. It was just between me and the —just my conscience and the Almighty, that I couldn't do it, and I had—I in no way wanted to inflict my will on it, nor did I feel that I had the right to, but I felt this is the way I believed, that this was just the way I had to act if I were to be—

Q. Did you feel you had the right to set yourself up against the laws of the United States? A. If they were laws that were contrary to the laws of God, yes, because—

Q. You couldn't do it? A. That's correct. To me the law of God comes first.

Q. Now tell me— A. Than the law of—

Q. Was this the topic of family conversation at your
(275)
home? A. Only that as a child I had always been brought up in an atmosphere of—that I was taught that peace and

non-violence and serenity and just love of people was—I come from—my family is there (indicating). My parents are marvelous people. They have always helped. They have been an open house to anybody who had any problems of any kind, and they just always taught us to help, and war was so completely contrary to this. War destroyed.

Q. Did your father hold the same views that you held? A. Yes.

Q. Did he teach—did he tell it to you, tell you what his views were?

Mr. Rosen: I object, your Honor.

The Court: Overruled. I will allow it.

A. Yes.

Q. Did he? A. Yes.

Q. Now, this was a matter then that had started when you were young? A. Yes. My—

(276)

Q. Has it been a pre-occupation with you, something that you think about all the time? A. Yes.

Mr. Rosen: Your Honor, I am objecting to the leading aspect.

The Court: Overruled. I will allow it. As long as the Jury recalls the instruction I gave, I will allow this evidence.

A. (Continuing) It had been used to tell us the stories of his father who had left the country that he was born in because he didn't want to participate in any war or anything that had to do with maiming of individuals or the elimination of their rights.

Q. Let's come to the problem of the conscientious objector who is—I'd like to have your understanding or—in words, tell me how you rationalized failure to register and claim a conscientious objection so that you could do work as the Court read to the Jury you could be required to do? A. To me they are the same. To me—you don't apply to a club that you don't approve of and then wait to be rejected. It's—it's what I said before, that if you drive—if someone drives the truck that commits the robbery, he's equally guilty, and (277)
especially—well, let me try and make it clearer.

In times like these now, the leaders in the country—

The Court: Do you pay taxes, Mr. Toussie?

The Witness: Yes.

The Court: Do you know part of your money goes to the war?

The Witness: Yes.

The Court: How do you justify that?

The Witness: I don't know.

The Court: All right.

Mr. Singer.

Q. Go on. Can you answer the Court's question?

The Court: He said he doesn't know. He answered it.

Mr. Singer: Oh.

Q. Do you want to say anything about it? Say— A. Yes. Well, can I?

The Court: Surely. If you want to expand on it, tell it to the Jury.

A. Yes. Well, I certainly never approved of it, but I—I
(278)
don't want to be where I am now, and a great deal of it goes for creative things and I do love my country. I love my country. It's just—I can't have anything to do with—I can't be a part of anything that has to do with the destruction of human life or of other people's rights or somebody else's family, somebody else's child. I can't—shall I answer the other—

Q. Tell me, what religion is your father and mother? A. Jewish. I come from a Jewish family.

Q. Well, Jewish people are not pacifists, are they, by nature? A. Yes, we are.

Q. Are Syrian Jews different than other Jews? A. Yes. Our community is extremely—the views are extremely pacifist.

Q. I can't hear you. A. Yes. The views of our community very much lend themselves towards pacifism and peace, and it's taught in our Hebrew schools, and I learned it in my Hebrew school in my neighborhood.

My friends—it's just always been the attitude, and the rational thing that you just didn't destroy other people.
(279)
You just—no one had the right—no one—if you read the bible, in the bible it says "God giveth and God taketh." That means God gives life and he is the only one who has to recall it. It says, "Thou shalt not kill," without any qualifications.

I see the bible here (indicating), and before—

(280)

The Court: Mr. Singer, I am not going to permit the witness just to expouse his philosophies.

The Witness: I am sorry.

The Court: I ask you to ask specific questions, Mr. Singer.

The Witness: I am sorry.

By Mr. Singer:

Q. Tell me, how do you equate this—did you refuse or did you fail to register because you were a coward, afraid to fight? A. Well, certainly not. I don't—I don't believe that the cause of peace is the cause of cowardice. I think that—

The Court: No. Strike out the answer as not responsive.

Please answer Mr. Singer's question.

A. (Continuing) No.

The Court: The question was: Did you fail to register because you were a coward.

The Witness: No.

(281)

The Court: Were you in any fear?

The Witness: No.

The Court: All right.

Q. You realized—did you realize that you might go to jail or that you would go to jail if you failed to register? Did that ever enter your mind at all? A. Yes.

Q. When did that first enter your mind? A. It first entered my mind when I had read of other people who had objected to war or to being a part of it and they were persecuted for it.

Q. You felt that these people were persecuted for it? A. Yes.

Q. Tell me about this—was a discussion—as part of your—the opinion that you ultimately came to, was it based upon anything with regard to what had happened to Jews?

Mr. Rosen: I object.

The Court: Objection sustained.

Q. Well, I had asked you before if you could explain to me your religion and the fact that Jews were not pacifists. You say they were in your group; is that correct? A. Yes. (282)

Q. Now, did anything occur that you studied before—before you were eighteen, with regard to this subject of Jews, which helped you form an opinion which you reported? A. Yes.

Q. What was it? A. The fact that my study of that made me greater not to be branded, much more intent than any—to me registrattion is being branded. When the Jews registered—

Q. Louder. A. When the Jews registered—in fact, the first thing that made me think of that was when I read Kay Noble's The Smoking Mountain. In that there is an episode—it's a book on the stories of occupied Germany, and there is a story about a Hessian, a professor, a woman professor in a Hessian university, and she tells us that the—the mistreatment of the Jews was a gradual process. She said when the first Jews Not Wanted signs went up, the Jews did not protest. And then after many months, not only the Germans didn't realize it but the Jews forgot that the—didn't realize that the signs were there. And then she put a picture of Hitler in a classroom and twice she refused

(283)

to take the oath of allegiance, and her students, who were college students, convinced her to take that oath, and she took it. What made—what convinced her was they said that you'd be doing what many anti-Nazis have done before. You don't have to believe in it. You'd be committing yourself to nothing, but you can accomplish much more as a professor than you can as an outcast in the town.

And now she has a picture of Spinoza, a Jewish philosopher, where that picture of Hitler used to be. She says that perhaps you'd say that this picture is here ten years too late and perhaps you're right, but she said we Jews never seem to find a way as individuals or as a group. We never seem to find a way.

The Court: Mr. Singer, I do not think everything this Defendant read is pertinent to the issue of a state of mind.

I ask you to confine yourself strictly to those issues, state of mind and mental capacity.

Q. I'm interested— A. Okay. Then we had—I saw the—

Q. Will you— A. —all—

(284)

Q. Will you obey the Court's instructions. A. Yes.

The Court: I am not interested in everything you said. I am interested in the state of mind at the time—

A. (Continuing) I had seen it. All the moral power and all the physical power in the world couldn't prevent the killing of six million Jews.

When they had registered, when they had put those

tatoos, when they permitted themselves to be tatooed they were conforming to registration and they were then put in ovens and killed.

I couldn't take—and registration was the first step and I couldn't take it.

(285)

Q. Now, then, tell me, over the years have you been seeing a doctor? A. Yes.

Q. What doctor had you—was the doctor who first—who you first remember as treating you? A. Dr. Baruch.

Q. What's his name? A. Dr. Baruch, Siegfried Baruch.

Q. You told him of some of your problems? A. Yes.

Q. Over the years—and when did this happen, when you were young? A. When I was a little boy. He was my doctor all my life.

Q. What type of medication did he give you? A. A number of them.

Q. What was the general type of the— A. There were anti-depressants and mood elevators.

Q. I can't hear you. A. Mood elevators and anti-depressants and tranquilizer.

Q. Had you been taking those—how old were you when you started to take those? A. Sixteen.

(286)

Q. I— A. 16, 17.

Q. I wish you would speak up. A. 16.

Q. I can't hear a word? A. 16 or 17. I'd been taking them for years.

Q. How long did you continue to take this type of medication? A. Many, many years, until—

Q. Until when? A. Until about last year, and then I had stopped for a while and then I had periodically—

Q. Now, in addition to your family doctor, did you go to

any other doctor? A. Yes, to a mental hygienist, psychiatrist.

Q. When did you start going there? A. In 1964—'5. His name was Arthur Lapousky.

Q. What? A. Arthur Lapousky.

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(290)

Dr. Siegfried Baruch, having been first duly sworn by the Court, was examined and testified as follows:

Direct examination by Mr. Singer:

Q. Doctor, what is your profession? A. General practi-
(291)
tioner, doctor of medicine.

Q. What school? A. From Vienna Medical School.

Q. What year did you graduate? A. 1923.

Q. How long have you been in the United States? A. Since 1939.

Q. From the time that you graduated from medical school in Vienna, did you practice medicine in Europe? A. Yes.

Q. In what city? A. In Vienna.

Q. Then, since you have come to the United States in 1939, did you ultimately become admitted to practice in the United States? A. Yes.

Q. In what year? A. In 1942.

Q. Between 1939 and 1942, what work did you do? A. I was in different hospitals. I had to make a living. I didn't have a license, and so I worked in Mt. Sinai Hospital in
(292)
Manhattan, in Beth David Hospital, in Staten Island Hospital, in Samaritan Hospital in Brooklyn; and then I opened my office.

The Court: In those hospitals, you did practice?

The Witness: I beg your pardon.

The Court: In those hospitals, did you practice your profession?

The Witness: Certainly.

The Court: You were allowed to practice?

The Witness: I made confinements, I did surgery, everything.

The Court: Yes. Without a license?

The Witness: That's before—

The Court: Without the license?

The Witness: That's right.

The Court: You are allowed to do that?

The Witness: Oh, yes.

The Court: In the hospital? But couldn't engage in private practice?

The Witness: That is right.

(293)

Q. Once you became engaged in private practice, as you said, I think in 1942— A. Yes.

Q. —was it that year that you met the Toussie family? A. Yes, my first year.

Q. Have you been the Toussie family doctor from then until now? A. Until now, yes.

Q. Were you the doctor who delivered Robert? A. No, I don't think if I delivered—this I couldn't say. I delivered one boy, but if I delivered Robert, I don't know.

Q. Over the years, has Robert—that's Robert seated there at the table? A. Robert, yes.

Q. Have you treated Robert over the years? A. Oh, yes.

Q. For how many years have you been treating him? A. Well, since he was a boy. When he was a boy they brought him for injections and, you know, diphtheria, whooping

cough. So then came the childhood diseases. I was called to the house. They used to live in Bay Parkway. Then
(293-A)
childhood diseases, different, but the general practice.
(294)

Q. As time came on, tell me, did Robert come concerning other things? A. In what aspect, please?

Q. Other ailments, other than these diseases that you have described? A. He came for different things.

Q. Yes? A. And these became gradually worse as he grew up.

Q. I wish you would speak a bit louder, please, so we can all hear you. A. Yes.

When he was—I remember well, when he was about six or seven years, his mother came to me, and she told me, she said, "Look, he is not like the other boys. He doesn't play with them."

So, in spite that he was a brilliant student, and, so, when he went up he separated himself, he was lonely, appeared to read books, abstract, rather than the books that the boys read, but he was not interested in that, and this became gradually worse.

When in the years that came, and since about a couple of years he became what I call—I don't want to keep too much time—schizoid personality, it was my diagnosis already about five or six years ago.
(295)

The Court: Will you please say that again?
The Witness: Schizoid.
The Court: Schizoid?
The Witness: Not schizophrenia, schizoid.
The Court: Personality?

The Witness: Yes, schizoid. In young people we have that.

The Court: Explain it to the Jury.

The Witness: Schizophrenic, everybody heard about that. It is a split personality.

On one side he is brilliant. Napoleon, for instance, was a split personality, also.

And on the other side, they are lonely. They are introverted. They don't talk much. They don't make friends. They don't go out. They read the books instead of friends that they talk to them.

About sex, I don't know. I think sex is normal with these people, if you are interested in something.

(296)

And, then, the whole thing came to anxiety. He had an anxiety neurosis, definitely.

He came during the years, for instance, on one or two I have mentioned a moment ago—he came on the left side he had pain, the left arm because he hurt himself, or hit himself. He came with a palpitation and he told me, "Doctor, I had a heart attack."

I couldn't bring this out from his head that he has no heart attack. He had a fast heart beat, but we went into different things, for instance, among many things, I think he had a dermatitis between the legs.

Now, many men have perspiration. They get a redness there, and a fungus sets in, and he put it in his head that it was a cancer.

I treated it, and I cured it, but I think he went somewheres else when he did not believe me, and, so, this went on for years and years.

(297)

Some days he came depressed, very depressed. I

had to elevate him. I gave him different medicines, mood elevators, Deprol, Ritalin, different drugs.

By Mr. Singer:

Q. What other drugs? A. Then, sometime he became elevated, very much elevated, so I had to bring him down.

For instance, I gave him Stelazine, or I gave him Equinol —this everybody knows, Miltown, like, and—these different drugs.

Q. Now, these last two drugs, I kind of recognized the name of them, what are they? A. Tranquilizers in case he is very up, or Deprol in case he is very down.

Now, they brought out a drug that is an equilizer, Trival, I think, I think I gave him this also.

Q. And how far back do these go? A. These go years.

Q. And how far back do these symptoms begin? A. This is what I say, I said his mother noticed when he was seven years old, she came to me, he does not behave like a boy (298)
seven years old, and this went on and on since, years.

Q. So that over all these years you have been treating him? A. Yes.

Q. For example, did you know that he had gone to a psychiatrist? A. No, I didn't know that.

Q. He kept that from you? A. I know he went. I was told later on.

I don't care. They cannot help him much more, otherwise the mental hospitals would not be full of these people.

Q. In other words, you are not a psychiatrist? A. Well, in his case, yes.

Q. In his case you feel that you are? A. Yes.

Dr. Siegfried Baruch—for Defendant—Direct

Q. Because you have known him all these years? A. Yes.

Q. So that your opinion is based upon your forty-five-odd years of experience? A. Yes.

Q. Or, more as a doctor, is that right? A. Yes.

(299)

Q. And your knowledge of this young man as you have seen him develop from the time he was a boy? A. Yes.

Q. And can you say now—tell me, what is your diagnosis of his condition? A. Anxiety neurosis and schizoid.

This is a—some kind of mild form of schizophrenia.

It is not the whole schizophrenic condition like we see in grown-up people.

It is a milder form, children, juvenile people, and adolescents. Besides, he is anxiety neurosis.

I'm not so sure about suicide ideas. Once I had a talk with him, and he spoke so about that, in general.

The Court: Can you fix the time when you talked to him?

The Witness: Well, it may be about six, eight years.

The Court: Would you say about 1960 to 1962?

The Witness: It may be, yes.

Q. But you have been treating him and giving him these drugs before that? A. Oh, yes.

(300)

Q. Well, that's what I am trying to—you talk about depressants and exhilirators. Did you give him those while he was going to high school? A. High school, yes. Yes, he took it.

Perhaps somewhere else, somebody else gave it to him also; or, perhaps, he took it somewhere.

Perhaps, some boys gave it to him. They always take something else besides what the doctor prescribes.

Q. In other words, he would also— A. You are never sure.

Q. What? A. You are never sure.

Q. Never? A. What the patient takes.

Q. What he does in addition to what you give him, is that right? A. Yes.

Q. Now, you are still the family physician today? A. Yes.

Q. And a friend, aren't you? A. Well, I am a friend to my patients, always.

Mr. Singer: That's all.

(301)

Cross examination by Mr. Rosen:

Q. Dr. Baruch, you have been testifying almost from memory, have you not? A. No—yes, from memory, yes.

Q. Do you have any records of Mr. Toussie? A. Toussie, I had—I spoke with Mr. Singer, I told him that until about five years ago I had records, and then when he came so often to me, one day two times, three times, and a couple of times a week, I didn't charge him too much or not at all, then I stopped it, and these I have to my memory.

A man who comes in the doctor's office once in five years is something different than somebody who comes one day three times and a couple of times a week.

Q. Do you say you know Robert Toussie very well? A. Yes.

The Court: Doctor, you have been referring to some notes?

Mr. Rosen: Yes.

The Witness: Yes.

The Court: Haven't you?

The Witness: Yes.

(302)

Mr. Rosen: I would like this—

The Court: Would you like to—

The Witness: No, these are my notes, what I made for today.

Mr. Rosen: May I see them?

The Witness: Sure.

The Court: Let them be marked as Defendant's Exhibit—that's C.

The Clerk: C for identification.

The Court: C for identification.

The Clerk: Two pages marked Defendant's Exhibit C for identification.

(Document marked Defendant's Exhibit C for identification.)

A. You cannot read it?

Q. I cannot read that.

I ask you whether you say, though— A. I beg your pardon?

Q. You know Robert Toussie very well, is that correct? A. Yes, since he was one year old.

Q. Have you ever heard of a Dr. Samuel Dunkell? A. I don't know him.

(303)

Q. Has a doctor by that name ever contacted you? A. Never.

* * * * *

Dr. Siegfried Baruch—for Defendant—Direct

MORRIS SARDELL, called as a witness, having been first duly sworn by the Judge of the Court, was examined and testified as follows:

Direct examination by Mr. Singer:

Q. Mr. Sardell, what is your occupation? A. I am a merchant.

I sell infants' and children's wear.

Q. Where is your place of business? A. New York, Nassau Street.

Q. What number? A. 86 Nassau.

(304)

Q. And how many years have you been in that business? A. In the business, well, I am aged 42, since I am 18 years old.

I am 42 now. I lost track of time. Over twenty years.

Q. Do you know Mr. Robert Toussie? A. Yes.

Q. And how long do you know him? A. Oh, I'd say at least ten years.

Q. And over the ten years that you have known him, you know other people who know him? A. Yes.

Q. Have you done business with Mr. Toussie? A. Yes.

Q. And have other people whom you know done business with Mr. Toussie? A. Yes.

Q. And do you know him at his home or only in the business world? A. No, I know him in his home, too.

Q. You know other people who know him at his home? A. Yes.

Q. Are you a Serian, of Serian extraction? A. Well, I —now, we are going to start a war. No, sir.

Mr. Rosen: Your Honor, I ask—

A. I am an American.

Q. Excuse me. I didn't mean it that way. A. Well, don't put it any other way, because I will not use the word. I am an American.

The Court: All right, the witness has answered.

Q. I didn't intend— A. I know.

Q. Besides, I don't want to fight another war. I am fighting one here. A. However, you could use the word Sephardic Jewish.

Q. Are you a Sephardic Jew? A. Yes.

Q. And you belong to the same Temple that the Toussie family belong? A. Yes.

Q. So that you know him in the Temple life too? A. Yes.

Q. Now, over the years, have you had occasion to discuss —has there been any occasion to discuss Mr. Toussie, rather, Toussie's reputation for truthfulness and honesty? A. Well, there's two ways of looking at it. Can I explain it, your Honor?

The Court: First, can you answer the question the way Mr. Singer has put it?

The Witness: Can you just say that again, sir?

The Court: Suppose the Reporter repeats it.

Q. Well, have you ever discussed with anybody, or anybody discussed with you his reputation for honesty and truthfulness? A. There's never been a need to. He is known to be an honest person.

The Court: So, you say it has never been discussed?

The Witness: Well, no. It is—again, it's two ways of looking at it.

If a person is bad, you discuss him. If he is good, then it's—he is considered as one of the ordinary type

(307)

of person. There is nothing to discuss.

The boy is considered, as far as his reputation is concerned, both in business and on the outside, both he and his family—

Q. No. Just he. A. He himself, only good.

The Court: So that you are saying although the opportunity has presented itself, the Defendant's character has never been questioned?

The Witness: That's right, it may be very good.

Mr. Singer: That's all I have.

Cross Examination by Mr. Rosen:

Q. Just a few questions, Mr. Sardell.

What is the extent of your business relation with Mr. Toussie? A. Right now?

Q. Or in the past. A. Nothing other than salesman. Selling merchandise.

Q. He sold you merchandise? A. His firm did. His firm did.

Q. Now, have you heard that Mr. Toussie failed to register for the draft? A. I have been told about it.

Q. Have you heard it from the community, in the Temple, or the people in the Temple? Were they aware of it? A. Yes.

Q. Business community? A. Well, did you say "business community"? Yes, I would say a lot of people.

Q. And do you know his reputation in the community for being a law-abiding citizen?

The Court: If your answer is the same as before, that the opportunity presented itself, but it's never been questioned, that's an answer.

A. It's never been questioned. His integrity or morality has never been questioned.

Q. I asked about his reputation as a law-abiding citizen. A. Yes, his reputation is good.

Mr. Rosen: No further.

The Witness: I could think of a lot worse.

(309)

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ROBERT I. TOUSSIE, having been previously duly sworn by the Judge of the Court, resumed the stand and continued to testify as follows:

Direct examimination by Mr. Singer (continued):

Q. Now, Mr. Toussie, there came a time—oh, excuse me. Do you remember in 1966 that you were at the FBI office? A. Yes.

Q. Now, before you joined the FBI—I withdraw that. You met an FBI Agent at a lawyer's office? A. Yes.

(310)

Q. Do you remember the next day, do you remember the day after you met the FBI Agent at a lawyer's office, you later went to the FBI office? A. Yes.

Q. And was that by arrangement? A. Yes.

Q. Were you accompanied by some person or a lawyer who is associated with Mr. Field? A. Yes.

Q. Now, then, did you register for the draft? A. I couldn't register for the draft.

Mr. Rosen: Your Honor, I ask—

The Court: Strike it out as not responsive.

Q. I want you to answer: did you register? A. I couldn't, therefore I didn't.

Mr. Rosen: I—

The Court: Strike out the answer as not responsive.

Q. Well, you said you couldn't, you couldn't so therefore you didn't. A. Right.

Q. That means you didn't. A. Yes.

Q. Is that correct? A. Yes.

(311)

Q. Now, tell me, when you were eighteen years of age, did you willfully refuse to register?

Mr. Rosen: Your Honor, I object to that question as calling for a legal conclusion, perhaps.

The Court: I will allow it, if it is first apparent that this witness understands what "willfullness" is.

Mr. Singer: Perhaps you are right. I am using the language of the indictment.

The Court: Excuse me. May I suggest using "voluntarily," "consciously," or words of that description?

Mr. Singer: Perhaps I will ultimately ask it that way.

By Mr. Singer:

Q. At the time you were eighteen, did you consciously refuse to go to the Draft Board and register? A. Yes.

Q. You knew you had to register? A. Yes.

Q. And did you do it because you voluntarily wanted to

(312)

do it or because you couldn't? A. I couldn't. My conscience wouldn't permit me to. Everything I believed in wouldn't permit me to.

Q. And those feelings continued? A. Yes, definitely, they are strong.

Q. But at the time you were going to a doctor—did you hear the doctor testify? A. Yes.

Q. This last doctor, whom I called, Dr. Baruch? A. Yes.

Q. Your family doctor? A. Yes.

Q. Were you going to him at that time? A. Yes.

Q. In connection with your complaints about being so low and depressed? A. Yes.

Q. And some other—the next day high and exhilarated; were you doing that? A. Yes. I was doing that because at that time I believed strongly—because I felt trapped, I felt that the state wanted me to become a party to killings and—(313)

Mr. Rosen: Your Honor, I move to strike it. That is not responsive.

The Court: No. I will allow it to stand.

A. (continuing) It wanted me to become a part of the system that—that murders, and kills and—and it was against everything that I had learned, against my beliefs, what I had—

Q. Were you told by the doctor that you were suffering from any neurosis such as he described, and anxiety, an anxiety neurosis? A. No.

Q. Did you tell Dr. Baruch that you had gone to a psychiatrist later on when you did go? A. No.

Q. Well, was there any reason why you should conceal that from your family doctor? A. Yes. It was just—I felt that I was—that—I—I believed all these things, and I just didn't want anyone else to believe—I didn't want to—I didn't want in any way to influence their beliefs in things. I didn't want them to know. It was just me. I couldn't. I didn't want to—to—

Q. Had you been told that you had a mild form of schizo-
(314)
phrenia? A. No, never.

Q. You believed that you had control over your acts, didn't you? A. Yes.

Q. Well, now, let me understand.

When you went to a psychiatrist, what were you seeking? A. I just had so much confusion within me, there was so much uncertainty and so much turmoil within me that I—I felt that I couldn't continue like that, and I just went for help.

Q. Then you stopped going— A. It took a lot out of me before I could see that I had to go to a doctor like a psychiatrist.

Q. Could you see yourself by any standards of your own thoughts as being mentally incapable of doing things? A. No.

Q. You feel that you are entirely capable? A. Yes.

Q. You disagree with your doctor's opinion? A. Yes.

Q. In that regard, that's the truth, isn't it? A. It certainly
(315)
is.

Q. You disagree with them, with their opinion? A. I do.

Q. As a matter of fact, is it not so that you stopped going to the last doctor, the last who—the doctor who testified here? A. Yes, Dr. Dunkell?

Q. Yes. A. Yes.

Q. I don't mean Dr. Baruch. I am speaking of— A. Yes, I stopped going to him.

Q. You stopped going to him. Why did you stop if you were confused and were seeking help? A. Because whatever —the things he told me were separating me from my family.

He was trying—the things—like everything he was saying was pulling me apart from my family.

Q. I don't understand it. What did he say that kept you from coming back to him?

What did Dr. Dunkell want you to do? A. He thought, for instance, that I could learn to conform to these laws—to these laws of, you know, Army and military and killing, and it was just—it was completely the opposite of what my
(316)
family had taught me, and what I had believed, and I felt if I continued to go to him, it would have continued me apart from the family, there would have been a complete conflict.

Q. Well, didn't your intelligence dictate to your mind that there was a necessity to obey the law, and that the law might even be bigger than your family; could you conceive of such a concept? A. Not—not when this law interferes with the law of God. That's the highest law.

And He says, "Thou shalt not kill," and I wasn't going to do anything that would—I would be afraid, I would be afraid to lay at the feet of the Almighty that I had disobeyed, that I had done these things—the other laws were the laws of men.

They had said that every war was the war to end all wars, and they got worse.

Every war in history, the people were told that this was the war to—

The Court: I don't want—

Q. No. I want you to explain to me, if you went to a doctor to help you, why was it that you wouldn't continue to go there for help; why did you stop going? A. For that reason, because it was pulling me apart from my family, from my
(317)
beliefs.

Q. Nothing he said could compel you to continue to go to him? A. No.

The Court: When you went originally, you thought you were sick, didn't you?

The Witness: I thought—yes, but for different reasons.

The Court: I assume when you go to a doctor it is because you feel there is something wrong with you?

The Witness: Yes. I was depressed and feeling—

The Court: When the last visit had been completed, did you think you were cured, or did you have an opinion on it?

The Witness: I don't know.

I just didn't want to be with—he was saying things that just weren't—

The Court: Well, can you answer that question: Did you have an opinion as to whether you were cured or not, or whether you needed any further medical help?

(218)

The Witness: No.

The Court: You didn't have an opinion at that time?

The Witness: No, I didn't know.

The Court: You didn't know. All right.

By Mr. Singer:

Q. Didn't he express an opinion that you weren't cured? A. He did, that I wasn't.

Q. What? A. He did.

Q. He said you weren't? A. He said I should continue to come.

He wanted me to come more regularly.

I felt I was fine, according to what I—he wanted—they were just contrary to what I believed in. The things—

The Court: We are talking about the medical aspect.

We are talking about whether you believed you were cured, and you said you had no opinion; isn't

(319)

that true?

The Witness: (Witness nods head.)

Q. You couldn't accept his opinion that you were not? A. Right.

• • • • •

Cross examination by Mr. Rosen:

Q. Mr. Toussie, just to pick up on this last thing you talked about, which doctor are we talking about, Dr. Dunkell? A. Yes.

Q. You just went to him in January, back in 1967; isn't that true? A. Yes.

Q. You went to him after this case became known to you; isn't that true? A. Yes.

Q. As a matter of fact, your lawyer sent you there? A. Yes.

Q. Now, did you go there because you thought you were sick or because your lawyer sent you there? A. Combination.

Q. So, in other words, you went to Dr. Dunkell because of this case? A. No.

Q. Did you ever hear of Dr. Dunkell before you met him? A. No.

Q. Who told you about him? A. Arthur Field.

Q. Who is Arthur Field? A. A lawyer.

Q. Did he tell you to go see Dr. Dunkell? A. Yes.

Q. For what purpose? A. I don't know his particular

purpose, but he—he wanted—I guess, to see how I was, what I was like.

The Court: Well, did he tell you why he was sending you to Dr. Dunkell?

The Witness: No. I had told him of my previous

(321)

experience—

Q. I am sorry—A. I had told him of my previous experiences with Dr.—you know, that I had seen doctors.

Q. This was after you had received notice from the Selective Service about your failure to register, is that correct? A. Yes.

Q. For the draft? A. Yes.

Q. Mr. Toussie, would you tell me, please, when you made application to Columbia University, School of General Studies? A. The fall of 1966.

Q. And as of that time, had you been—A. Wait—

Q. Fall of 1966?

Mr. Singer: I can't hear you.

A. Yes. I am sorry. Fall of 1966.

Q. Now, as of that time, had you had any treatment by a psychiatrist as of the fall of 1966? A. Yes.

Q. How long before the fall of 1966 had you been to a psychiatrist? A. Not long, a couple of months.

(322)

Q. You had been to a psychiatrist? A. Yes.

Q. Mr. Toussie, I ask you whether you were asked in your application to Columbia University the following question—

Mr. Singer: I am going to object to it before he asks it.

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(330)

The Court: Do you concede, without conceding the admissibility of the evidence, that this is his application?

Mr. Singer: Suppose I show it to him.

The Court: Yes.

Mr. Rosen: Well, here is a certification—

Mr. Singer: You don't need a certification if he filled it out.

The Court: Indicate that the witness is consulting with his counsel.

(Whereupon the witness consulted with his counsel)

Mr. Singer: What page is this on?

Mr. Rosen: I think it is on the first page.

The Court: Do you concede the genuineness of the document?

Mr. Singer: Yes.

The Court: Because I don't know whether you intend to offer it in evidence—

(331)

Mr. Singer: There is no issue about it. I said I conceded the genuineness of the writing, the word "No" on that paper.

The Court: All right, I will allow it, and you have an exception.

The Jury may be seated, and the question is: "Did you in an application say that in answer to a question?"

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Samuel V. Dunkell—for Defendant—Cross

(332)

By Mr. Rosen:

Q. Did you fill out an application for Columbia University, School of General Studies, in 1966? A. Yes.

Q. Were you asked whether you had consulted or been treated by a physician for a mental or nervous disturbance within the five years preceding the application? A. Yes.

Q. And do you recall what your answer to that question was? A. Yes, "No."

Q. You answered that you had not been treated? A. Right.

The Court: Was that answer true?

The Witness: No.

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(338)

September 9, 1968
10:45 o'clock A.M.

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(339)

SAMUEL V. DUNKELL, having been previously duly sworn by the Judge of the Court, resumed the stand and continued to testify as follows:

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Cross examination by Mr. Rosen:

Q. Mr. Dunkell, you told this Jury on Friday that in your opinion did not have the capacity to commit this crime, is that correct, sir? A. Could you clarify that, capacity—

Q. To commit this crime of failing to register for the

draft; isn't that your testimony? A. My testimony was that, in my opinion, his mental state was such that he could
(340)
not register for the draft in 1959 through 1967, when I saw him.

Q. Could you please tell us when you first met Mr. Toussie? A. According to dates, January 26, 1967.

Q. Now, who referred Mr. Toussie to you? A. Mr. Arthur Field, an attorney.

Q. And you knew at that time that Mr. Field was an attorney, did you not? A. Yes, sir.

Q. Now, Mr. Toussie came to see you about his problem with the draft; is that correct, sir? A. That's correct.

Q. And you were prepared at that time to make a report to Mr. Field on what you found? A. I had a series of consultations with Mr. Toussie, and then I submitted a report to Mr. Field.

Q. You said you had a series of consultations with Mr. Toussie before you submitted a report to Mr. Field? A. That's right.

Q. Is that correct? A. That's correct.

Q. Well, how many conversations did you have with Mr.
(341)
Toussie before you submitted the report to Mr. Field? A. I think two or three.

The dates—I saw him twice.

Q. You saw Mr. Toussie twice before you came to your conclusions and reported this to the lawyer, is that right? A. That's right.

Q. Now, how long was the first visit, doctor? A. Forty-five minutes.

Q. And did you speak to anyone else at that time, aside from Mr. Toussie, on January 26th? A. No, Mr. Toussie alone.

Q. He came to the office alone, is that right? A. No, he came with his brother, but I spoke to him alone in my office.

Q. Now, on the second visit, when was that? A. January 30th.

Q. And how long did that last? A. 45 minutes to an hour, approximately.

The Court: You say that January 30th was the second visit?

The Witness: Yes, sir.

(342)

Q. Is that when you prepared the case history on Mr. Toussie? A. After that.

Q. On January 30th, doctor, isn't that true? A. Well, I was taking notes continuously.

Q. Now, doctor, you were provided with a memorandum from the lawyer, were you not, at these first two conferences? A. No, sir.

Q. Doctor, I show you this piece of paper, have you ever seen that before? A. Yes, sir.

Q. Was that in the file of Robert Toussie on Friday— A. This is the file of Robert and Sam Toussie.

This was given to me by Mr. Samuel Toussie some time, I believe, this fall.

Q. This fall? A. Last fall.

Q. And didn't it come out of the file that you brought to this Court? A. Yes, sir.

Q. Now, I ask you, were you provided by either Samuel or Robert Toussie with a legal definition of insanity?

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(343)

A. I was not provided by legal definition of insanity because I had known these definitions of insanity prior to Mr. Sam Toussie coming to my office.

Samuel V. Dunkell—for Defendant—Cross

Q. Were you provided with a memorandum that discussed a situation where a man may be held not responsible for his acts? A. Yes, but that was—that was known to me. I mean—

The Court: Do you know the definition of mental incapacity?

The Witness: The definition of mental incapacity, according to the newer law, is that a man does not have the capacity to understand the charge proffered against him or the nature of the crime.

The Court: Is that the entire definition?

(344)

The Witness: No, sir.

The Court: Well, tell us what you understood at the time of the examination to be the definition of mental incapacity to commit a crime.

The Witness: Yes, sir.

As I understood it, the previous law had been amended so that if an act was performed which rose out of a man's psychological situation, that he—that the particular person would not be responsible for committing this crime.

The Court: Did you get that definition from a lawyer?

The Witness: Yes, sir, because a lawyer on a previous case had sent me a long abstract from the Law Journal relating to this particular question.

The Court: I see.

Q. Doctor, do you understand if there is any difference between a mental disease and mental defect? A. A mental defect is a mental disease.

Q. No distinction in your mind, is that correct? A. There
(345)
is a qualitative distinction.

Q. Would you distinguish it for us? A. The qualitative—am I speaking legally or medically?

Q. Any way you wish. A. Well, when we say disease, we mean a symptomatic state in which the individual is not functioning according to normal standards. I would presume that the man has a defect.

If he has a defect he is not going to be functioning according to his normal standards.
(346)

The Court: What is the medical definition of a psychosis?

The Witness: A psychosis, as I understand it, is a—really a legal definition.

The Court: Isn't there a medical definition?

The Witness: There is a medical definition of certain states which are called psychotic states.

The Court: Is that a mental disease?

The Witness: And we have categories—these are examples of medical disease, yes.

The Court: Need there necessarily be a physiological defect?

The Witness: No.

The Court: In order to be classified—

The Witness: No.

The Court (Continuing): To be classified as psychotic?

The Witness: No.

The Court: What is a neurosis?
(347)

The Witness: A neurosis is a chronic state of maladaptation with certain symptoms.

The Court: Is it a permanent defect?

The Witness: No, sir.

The Court: Is it a psychosis?

The Witness: No, sir.

The Court: Did you describe the defendant's condition as a neurosis?

The Witness: As a neurotic reaction, yes.

The Court: Nothing unusual to find a neurosis, is there?

The Witness: Yes. Depends on the degree of neurosis.

Certain neuroses may be very severe, very incapacitating.

The Court: A large percentage of the population is classified as neurotic, isn't it?

The Witness: A large percentage are classified as neurotics, but some are mild and some are more extreme, your

(348)

The Court: All right, Mr. Rosen.

By Mr. Rosen:

Q. Doctor, you just told the Court and the Jury a few moments ago what your theory of legal insanity was, what you understood legal insanity to mean—

The Court: Objection sustained. You were talking about mental incapacity, Mr. Rosen.

If you want to pursue insanity, then you have to establish a foundation.

Q. Do you have an opinion as to whether Mr. Toussie is insane?

Mr. Singer: Objection.
The Court: Objection sustained.
Is insanity a medical term?
The Witness: No, sir, insanity is a legal definition.
The Court: All right.

Q. Doctor, tell us what dates you saw Mr. Toussie besides the two dates you already mentioned? A. I saw him on February 7th, February 9th, February—no, I am sorry. That's an error.

I saw him on February 9th, February 13th, in addition to the two days given.

(349)

Q. Now, on February 9th, did you have Mr. Toussie's history form in your possession at that time? A. Yes, sir.

Q. Doctor—A. You mean the history form—(indicating)?

Q. Yes, that history form, you say you had in your possession (indicating)? A. Yes.

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(350)

The Clerk: One sheet, dated February 8, 1967, marked Government's Exhibit 6 for identification.

(So marked.)

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(351)

Q. Doctor, I show you Government's Exhibit 6 for identification, have you ever seen that before? A. Yes, sir, it is a copy of a report that I sent to Mr. Field.

Q. That's not a copy of a report, is it, doctor?

• • • • •

The Witness: This is a copy of a report—well, it

is actually the enclosing letter, the covering letter with a report that I had sent to Mr. Field on Mr. Robert Toussie.

(352)

Q. Now, when did you send your report to Mr. Field on Robert Toussie? A. I sent my report, probably, February 8th.

Q. And what did you enclose with that report, if anything? A. I enclosed a copy of this record which—in typewritten form plus a copy of this letter which is here.

Q. By the time Mr. Toussie came the third time to you—A. Yes, sir.

Q. You had already formed your conclusion and reported it to the attorney? A. That's correct.

Q. How long did Mr. Toussie stay that time? A. 45 minutes, approximately.

Q. And the last day was the 13th of February, I believe, sir? A. That's correct.

Q. And how long did he stay at that time? A. 45 minutes.

Q. Doctor, do you—keep an index file on all your patients? A. No, I have a—you know, a standard appointment book.

(353)

Q. Do you have that book with you, sir? A. No, sir.

Q. Is it available? A. In my office.

Q. Would that indicate when a patient came to see you? A. Yes, these are the dates I took from this (indicating).

Q. Do you usually make notes when a patient comes to see you? A. I usually don't make notes in ordinary treatment, except for exceptional circumstances such as a very important dream.

I find that notes, except for doing research, have no particular value.

Q. Doctor, did you take any notes on February 9th or February 13th? A. No, sir.

Samuel V. Dunkell—for Defendant—Cross

Q. You have no other record pertaining to Robert Toussie? A. Well, I felt I had enough in terms of the exhaustive interview I had taken.

Q. Well, do you have any other record of Robert Toussie? (354)

A. No, sir.

Q. Doctor, I show you Government's Exhibit—Government's Exhibit A for identification which is the personal history form, is that correct? A. That's right, sir.

Q. That paper that you have in your hand, you didn't write that on January 30, 1967, did you? A. Yes, sir.

Q. Well, wasn't there an original report, doctor? A. This is the original.

There's a copy of this which is typewritten and submitted with the original letter to Mr. Field.

Q. Doctor, didn't you tell a representative of my office, that you had recently rewritten your notes to leave out some embarrassing portions? A. No, sir.

Q. Who wrote that first page in Government's Exhibit A, doctor? A. This page here?

Q. The discussion page? A. I did.

Q. Who wrote the second page, doctor? A. Which is the (355)

second page?

Q. The second page attached to Government's Exhibit A. A. I wrote that. It is my handwriting.

Q. Is there a date on the discussion page— A. No, the discussion page is not dated.

Q. When did you write that discussion page? A. Approximately February 8th.

Q. Now, doctor, isn't it fair to say that you—based your findings and opinions on the information contained in that case history form? A. Yes, sir.

Samuel V. Dunkell—for Defendant—Cross

Q. Will you tell us how you received the information that you put on the case history form? A. My interview with the patient.

Q. Just Mr. Toussie? A. That's correct.

Q. Now, referring to the personal history from attached to Defendant's Exhibit A, did Mr. Toussie tell you that he had been to see a psychiatrist for two and a half years? A. That's right, he did.

Q. Did Mr. Toussie tell you that he had problems with his family? A. That he had problems?

(356)

Q. With his family? A. Mr. Toussie's family?

Q. Did Mr. Toussie tell you that he had problems with his family? A. With his mother and father?

Q. Doctor— A. I don't understand what you mean by "family."

Q. Would you kindly refer to your notes and see if you— make any remarks on this? A. I have a section on "family history."

Is that what you are interested in, sir?

Q. I asked you a question, doctor.

If you cannot answer it— A. I wish you would clarify it. Narrow "family—"

The Court: Well, do you use "family" in your report?

The Witness: Yes.

The Court: What did you mean by "family"?

The Witness: His relationship to his mother, father, brothers, sisters and immediate, close relatives.

Q. And did Mr. Toussie tell you that he was having prob-

(357)

lems with his family? A. He told me that he had problems with an uncle; yes, sir.

Q. Doctor, I call your attention to the third line of this report, does that refresh your recollection? A. It says here, "had problems with family and—and girls." "And girls then."

This refers to some interfamilial problem, relating, I think, to the period 1962.

Q. I don't know if everyone can hear you. A. This refers to a situation which he had in 1962.

It says here, "Actually began the end of 1962."

(358)

Q. What began at the end of 1962? A. Bad depression, and then he goes on, he says he had problems with family and girls then, in 1962.

Q. Well, what reference do you have to 1959? That's the first date of this indictment, doctor. A. I will—

Q. Do you have any reference to 1959? A. No, sir, not in this indictment, except in terms of his general history as such.

Q. Now, did Mr. Toussie tell you that he had been taking drugs? A. Yes, he told me he had been—

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(359)

A. Yes, here it says that he took mellaril and tofranil, and that he was now, at the time of seeing me, on triaval.

Q. Doctor, did he show you any prescriptions for those drugs? A. No, sir.

Q. Was it important that he was taking those medications, in your opinion? A. Yes, sir.

Q. Well, did you verify the fact that he had been taking

these medications? A. These are standard drugs which a patient in this state would be on—

Q. There is nothing unusual, then? A. Nothing that is unusual, except in terms of psychiatric practice, "unusual."

The Court: What are these drugs?

(360)

The Witness: Mellaril is a so-called tranquilizer. Tofranil is an anti-depressant, a mood elevator.

Q. Have you ever prescribed these drugs for anyone? A. Yes.

Q. Is it unusual, when you make this type of prescription? A. It is not too unusual.

The only question I had in terms of prescription was that these are rather strong drugs, and I would rather have seen him on something milder.

Q. Well, what did you put him on, doctor? A. I didn't put him on any drugs at that time.

Q. Now, didn't Mr. Toussie even tell you the name of the psychiatrist he said he was seeing for two and a half years? A. Yes, he gave me his name here.

Q. And didn't he tell you that he was seeing him once a week for two and a half years? A. That's true.

Q. Doctor, does the name of that psychiatrist appear on your report? A. That's right.

(361)

Q. Isn't it crossed out, doctor? A. I crossed it out.

Q. When did you cross it out? A. In the dictation, I presume.

Q. Did you cross it out in two other places, too, doctor? A. Yes, because I think that for some reason, I—when it comes to the previous psychiatrist that the man had, I just

refer to him as a psychiatrist rather than as a specific psychiatrist.

Q. In other words, you didn't contact this other psychiatrist? A. No, sir.

Q. Doctor, you knew that there was a lawsuit involved here, didn't you? A. Yes, sir.

Q. And there would be a possibility of a criminal trial, doctor? A. Yes, sir.

Q. Yet you did nothing to verify the things that were told to you? A. Well, I had my verification from other sources; that is, in terms of the man's state, which I evaluated in (362)
terms of the history which showed a certain amount of internal consistency with what he describes.

The internal consistency came out in rather naive statements whose importance I would presume, ordinarily, a patient wouldn't be able to evaluate.

Q. Doctor, let me ask you something.

You base an opinion on certain symptoms that were told to you; is that correct? A. I base my opinion not only on the symptoms but on the patients in front of me telling me these symptoms plus the material that he gives me, plus the internal consistency of the material, plus the predictability of giving that—

Q. Do you have any indication on your medical history form of any objective facts that you observed?

Did you write down any objective facts that you observed? A. I wrote down the statements that he gave me. The objective facts are in my subjective impression.

Q. You never wrote down any— A. No.

Q. What you saw him do? A. No, because it is pretty self evident.

(363)

Q. Did you give him a Dvorak test? A. I am not skilled in that test.

Q. Did you refer him to anyone who would be? A. I might have, but I felt no need for it at that time.

The Court: What is a Dvorak test?

The Witness: It is a psychological projective technique which is valid when done by a skilled practitioner, otherwise, it is relatively invalid, I feel. It is an ancillary, diagnostic tool.

Q. When you wrote this history, doctor— A. Yes.

Q. —did you leave out any information that you thought might be embarrassing to either Mr. Toussie or his family? A. No, sir.

Q. Did you perform an apperception test on Mr. Toussie? A. No.

Q. Did you refer him to anybody who did? A. No.

Q. Would it be fair to say, doctor, that you relied on the truthfulness of Mr. Toussie's statements— A. No, not

(364)

necessarily.

I relied on the internal consistency.

In my experience, it is very hard for a patient to tell you certain things which they don't understand but would show certain patterns of reaction.

Q. You relied on the fact that he said he saw a psychiatrist for two and a half years? A. Yes.

Q. You relied on the fact that he said he was taking certain medication, didn't you? A. That's correct.

Q. You relied on the fact that he said he had nightmares as a child? A. Correct.

Q. That he was afraid of death? A. Correct.

Q. He told you all these things? A. Yes.

Q. And you believed him, to come to your conclusion, obviously? A. Correct.

Q. Did you do anything besides think about what he said to verify any of the statements that Mr. Toussie made
(365)
to you? A. Yes. I questioned him about the dates when the nightmares began.

Q. What did he say? A. And when did they end?

He said they began at age 4.

Q. Didn't he say that he had nightmares after seeing a Frankenstein movie? A. He was already having nightmares, I believe, at that time, that he especially remembered nightmares after seeing a Frankenstein movie.

Q. That's very unusual, that a young man would have that kind of nightmares? A. It is unusual for a young man to have nightmares, consistently over a number of years.

It is symptomatic of something.

Q. Did he tell you when he stopped having those nightmares? A. I questioned him carefully. He was unable to give me an accurate time, but I speculate as to the time.

Q. I rather not have speculations, but he did tell you when the nightmares came back? A. Yes.
(366)

Q. He said they just came back a few weeks ago? A. Yes, sir, prior—a few weeks prior.

Q. About the time when this draft situation became known, is that correct? A. I assume so.

All I know is that they occurred. He said they were returning, which was, to me, a sign of increasing decompensation at this time.

Q. Doctor, can you tell us what Mr. Toussie's chief com-

plaint was, when he came to see you as a doctor? A. I have it fairly well written down. May I read them?

Q. Certainly. A. He says he didn't register for the draft—

Q. I am sorry, I said the chief complaints. A. Depression. Nightmares. Anxiety. Fear of death. Thoughts of suicide. And that he had been seeing—he had been having these depressions since 1962.

Now, in the further—

Q. I asked for chief complaints, doctor, don't you have a heading called "Chief complaints" on your form? A. (367)

The question—

Q. No, no. Doctor, on your form, your medical form, don't you have a heading that says, "Chief complaints"? A. I do.

Q. What are the first four words under that heading of "chief complaints"? A. "Didn't register for the draft."

Q. He didn't say he wasn't feeling well, he said he didn't register for the draft, that's why he came to see you; is that right? A. You have to understand when you take an interview of this situation, it is a fluid situation.

I asked him why he was here when I talked to him, and what this background material was, and then I write notes on what he tells me. It is not a verbatim type—

Q. What was your opinion on why Mr. Toussie didn't register for the draft? A. My opinion was that he was suffering from an acute—at the time I saw him?

Q. Yes. A. 1967, that he was suffering from an acute anxiety reaction with depression.

(368)

Q. An acute anxiety reaction? A. Yes, with depression.

Q. Doctor, wasn't it a chronic acute anxiety reaction?

A. You are right, but it had reached an exacerbated point.

Q. What? A. It was chronic, but it was exacerbated at that point.

Q. You say—

The Court: Was the exacerbation due to the fact that there was a pending criminal proceeding?

The Witness: I would presume so. I would presume so.

(369)

The Court: Is the fear of death abnormal, Doctor?

The Witness: Fear of death at his very age is abnormal, yes.

The Court: But we all have fear of death; isn't that so?

The Witness: Yes, but a neurotic fear of death is a fear of death that's outside the veil or normality.

In other words, even though we are afraid of death, if we are confronted with the fact of death we wouldn't get anxiety reactions, generally, overt anxiety reactions.

The Court: At which point do you decide that the fear of death is abnormal and, therefore, neurotic, I assume?

The Witness: When it interferes with his behavior in an ordinary course of events. In other words, this man told me he could never attend a funeral. Now, not—

Mr. Rosen: I cannot hear that, your Honor.

(370)

The Witness: He told me he could never attend a funeral. Now, in the normal family one attends

funerals even though one has a fear of death, but the fact that he could not attend the funeral showed that his fear was extreme and irrational.

The Court: Did you take into consideration that he operated a business?

The Witness: Yes, sir.

The Court: Suppose the fear of death did not interfere with his operation of a business, would you still say that?

The Witness: Yes, sir, because fear—

The Court: It was a phobia?

The Witness: No. Phobias, as we call them, are something specific and they relate to specific situations.

This man had two things. He had a general anxiety reaction, and then, in addition, he had specifics. These anxieties seemed to focus on certain things. In his case, one of the focuses was the

(371)

fear of death or situations relating to death, which is common in the neurotic patients, I have found.

The Court: But you do understand that at the time you examined him he was charged or about to be charged for failure to register for the draft?

The Witness: Yes, sir.

The Court: Did you take that into consideration in determining what his state of mind was before?

The Witness: I thought that at the time that I saw him he was under acute stress and that he was having a breakthrough of symptoms, but that this breakthrough facilitated by the fact—the nature of the breakthrough that occurred was facilitated and determined by the general structure of his neurotic state in general.

In other words, some people may, under stress, decompensate in the form of irrational thoughts, delusions, for example, delusion of thoughts. This man
(372)
decompensated in the form of depression and acute anxiety, which is characteristic of this particular problem.

Cross Examination by Mr. Rosen:

Q. Doctor, I'd like to talke a bit about this fear of death. You called it a neurotic fear of death? A. Yes, sir.

Q. Didn't you also say any avoidance of all situations having to do with death? A. Yes, sir.

Q. Could someone fly in an airplane that had this avoidance of all situations having to do with death? A. That would depend, Mr. Rosen. It would depend upon his subjective evaluation or interpretation of what an airplane flight is.

Q. Could someone go swimming out in the ocean by himself with this fear of death? A. He might.

Q. Someone drive a racing car with this fear of death? A. He might very well drive a racing car, as a—what we
(373)
call a counter-phobia maneuver.

The Court: But if he refused to engage in those activities, you would say it was consistent with the fear of death; would you not?

The Witness: It is a little more complicated. A little more complicated.

The Court: Can you answer that yes or no, Doctor?

The Witness: No, I don't think I can.

The Court: All right.

The Witness: I'd have to elaborate on that.

Q. Didn't you also say that he had a fear of his aggressivity? Am I pronouncing it right, Doctor, aggressivity? A. Yes.

Q. Did you say that? A. Yes.

Q. Didn't you say, though, in your discussion, that this aggressivity is now controlled? A. Yes.

Q. So that would eliminate No. 2, in your opinion; (374)

wouldn't it, sir? A. No, because the aggressivity was in danger of getting out of control. But when I say "is now controlled," I mean that he's using mechanisms to reduce the threat of his aggressivity coming through; namely, depression.

Q. Is that as clear as you can make it, Doctor, to this Jury? A. Well, a depression is a way of punishing one's self for an inner crime, and the inner crime that he had was aggressivity.

So, therefore, if he punished himself by saying, "I'm not good and I've sinned," that would atone for this crime of aggressivity and, therefore, he would be somewhat under control and not be frightened by his aggression coming through.

The Court: Doctor, is it your usual practice to ask for reports of other treating psychiatrists?

The Witness: Sometimes. It depends upon the case, your Honor. I thought this case was internally so consistent in terms of the material that he gave me, that I really didn't feel it was necessary. That's

(375)

another reason why I didn't order psychologicals on him, because I felt that they would just report along the same lines that I had found.

I would certainly wish that we had had psychologicals on him. I think they would have really supported my findings.

The Court: Well, instead of just speculating on that, why didn't you have the tests made then?

The Witness: As I say, it depends upon the situation. I thought that I had enough material to be able to venture an opinion on this case.

The Court: But you knew you were going to testify?

The Witness: Yes, sir.

The Court: Wouldn't it have been nice to have confirmatory information?

The Witness: Definitely. I certainly wish I had now.

Q. Doctor, you got paid for those four visits; didn't you?

(376)

A. Pardon?

Q. Did you get paid for those four visits? A. Yes, sir.

Q. Getting paid for testifying in this case? A. Yes, sir. I'm not seeing my patients at this time.

Q. I apologize if it's taking that long, Doctor.

But you did testify on Friday to certain things and I'd like to see i—the Jury completely understands it. A. All right.

Q. Doctor, you have classified anxiety reaction as a neurotic conflict; is that correct? A. That's correct.

Q. Is it not true that virtually all persons have some

neurotic conflicts which determine certain of their behaviors? A. That's true.

Q. Would you say that roughly similar psycho-dynamics in other persons, for example, fear of one's own impulses, with resulting reaction formation may underlie an excessively strong moralistic position? A. True.

(377)

Q. That's true?

The Court: Now tell us what it means?

The Witness: It means that, as I explained—I think I explained this last time. I'll go through it again.

That if one has a fear of some type of impulse which is not socially acceptable and—remember, these impulses are generally distortions because they are phantasies in childhood impulses usually, and, therefore, they are all actually, in phantasy form, rather worse than what they would be in reality, that one defends one's self against this by, so to speak, behaving in exactly the opposite of what one is afraid that one will do if actually out of control.

By Mr. Rosen:

Q. We are to excuse these type of people from registering for the Draft, in your opinion; is that not correct? A.

(378)

No, that's not the conclusion I would draw.

Q. Doctor, do you remember being asked this question and giving the following answer:

"Q. What is your opinion with respect to the Defendant's ability to conform with the requirements of the draft

law, the registration part of the draft law, at the time I mentioned?"

Do you remember that question? A. Yes, sir.

Q. Do you remember this answer:

"A. Yes, I feel that neurotically, on a neurotic basis, the Defendant is unable or was unable and still is, I believe, to follow the law that is required in the terms of the draft situation, on the basis of a neurotic conflict which he has and which he suffers from."

Do you recall giving that answer? A. Yes, sir.

Mr. Rosen: Page 1962, Mr. Singer.

Q. Doctor, would it be possible for a severely neurotic person to exceed the speed limit or to go through red lights
(378a)
in an automobile because of an unconscious neurotic conflict, let's say, regarding authority or masculinity? A. He might, yes.
(379)

Q. Could you say that this person was incapable of controlling his behavior because of mental illness? A. No, sir. I think that he might have been testing himself out at this point.

Q. Yet the law would hold him responsible; isn't that correct, doctor? A. He should be responsible at that point, yes, for passing a red light. But it depends on the man who is passing the red light, the total personality plus his illness.

The Court: Doctor, can you express an opinion as to whether his refusal or failure to register to the

draft arose in any way out of any moral concepts he held?

The Witness: I have a little more sophisticated view of that. I feel that his moral concepts were really reaction formations against a neurotic conflict.

So while he was registering—registering for the draft and then—not registering for the draft and he could do it under the rationalization that he was be-

(380)

ing moral and opposed war, yet we know—I would speculate, in my opinion, what he really was afraid of was his warlike nature coming out, his actual aggressivity coming out in a very threatening way.

Q. You felt he had a war-like nature, doctor? A. I mean aggressivity, primitive aggression, which is very war-like.

Q. Then it becomes a question of what incapacity means? Aren't we down to that point now, doctor? A. All right.

Q. Isn't that based on how severe a mental illness has to be before we can say—it renders someone incapable? A. I wonder if it's not more than just severe but whether it has certain kind of relevancy. In other words, if a phobic person is afraid of to fly, he may be functioning well in the rest of his world.

For example, if a phobic person is afraid of horses, it does not mean anything to him in his life because we don't use horses or see horses very much, say, in the city. So it has to do with relevancy.

Q. Mr. Toussie is phobic? A. Pardon?

(381)

Q. Is he phobic, doctor. A. He has certain phobias, yes, fear of death is a phobia in his case.

Q. What have you seen in Mr. Toussie that—at your office on that day, January 30th? What did you see which confirmed your theory that he is afraid of death? Did you give him any written tests? A. No. It's not only what I saw but what I heard.

The Court: Is it unusual to have fear of death and thoughts of suicide standing side by side in the same person?

The Witness: No, sir. You have to understand that when I say—speak of internal consistency, he told me that he had been in treatment for two and a half years and that in his treatment a memory had emerged where an aunt had lost her mother and carried this—him, then three and a half years, in her arms for over a period of months and spoke "Oh, I lost my mother," etc., this gave him some kind of a linkage with a fear of death, which then he used later on in terms of other material which I have here.

(382)

The Court: But many children suffer these traumas; don't they?

The Witness: We all suffer them, yes.

The Court: That's right. And you grow out of them usually? That's usual; is it not?

The Witness: Yes, but we don't usually have nightmares that last for what I assume were six years.

By Mr. Rosen:

Q. Why do you assume, doctor? A. Because I assume on the basis of other evidence that the nightmares dimin-

ished when he was able to establish a change in his personality at the age of 10.

Q. Then it didn't come back until he was confronted with this draft situation? A. I would assume that he had—he told me he had sporadic nightmares, but it was not as a constant thing.

Q. What is a nightmare, Doctor, a bad dream? A. A nightmare is a dream which has a threatening quality which awakens one usually from sleep.

(383)

Q. That's—many people have nightmares throughout their lives? A. They occur but rather rarely in most people.

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Q. Isn't a neurosis a form of personality disorder? A. From a layman's point of view?

Q. Yes, sir. A. I can only speak from a professional point of view here.

(384)

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The Court: Surely.

Would you say the defendant was slightly neurotic, moderately neurotic or severely neurotic?

The Witness: I'd say, moderately to severely neurotic.

The Court: Are there such classifications in medicine?

The Witness: Yes, sir. He became severely neurotic probably beyond the beginning of '62, but he was suffering from a moderately chronic neuroses up to that point.

The Court: Would you say that when this litiga-

(385)

tion is disposed of there is a likelihood that he will be less neurotic?

The Witness: I can't answer that one.

The Court: You heard the term litigation neurosis; have you not?

The Witness: Oh, yes.

The Court: Is this an accepted factor in psychiatry?

The Witness: Yes, but if I understand litigation neurosis, that refers to one who brings cases against other people.

The Court: It is never relevant to a defendant being sued?

The Witness: As far as the Defendant is concerned, I think it has to do with the Defendants who obtain monetary or other rewards from prolonging the litigation.

The Court: We are talking about secondary gain? That's something else; is it not, doctor?

The Witness: Yes, sir.

The Court: I am talking about the pressures that

(386)

litigation bring on an individual. Doesn't that in some manner account for neurosis?

The Witness: Only to the extent that this individual is prepared for it.

The Court: Don't we have neurotic episodes only when the pressure is acute?

The Witness: There are certain forms of prison psychoses which occur in the—but I don't think you would have a neurosis really break out in terms of, as we understand neurosis, only the man had a—

was a neurotic already and, therefore, was predisposed.

The Court: Do you say that this litigation that you are testifying in in no way affects this Defendant's condition?

The Witness: I'd say, very seriously affects his condition.

The Court: Now I am asking the other question, once this has been disposed of, would you expect some change in personality or—

The Witness: I would expect—

(387)

The Court: —in reaction, behavior?

The Witness: I can't say because once he's been under threat—you know, I don't know whether his defenses really will be functioning as well afterwards as they were before, so he may really improve somewhat but still remain at a rather elevated kind of period of illness, elevated stage of illness.

It would be merely because his neurotic defenses have failed and, therefore, there is always a cumulative fear that they will fail again.

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Redirect Examination by Mr. Singer:

Q. Tell me, doctor, this morning at my request, did you read the testimony of Dr. Baruch— A. Yes, sir.

Q. —given here last Friday? A. Yes, sir.

(388)

Q. Was that the first time that you heard of Dr. Baruch, this morning? A. Yes, sir.

Q. Have you read his testimony? A. Yes.

Q. All of it that he gave? A. Yes.

Q. You weren't present when he testified; were you? A. No, sir.

Q. Now, from your reading of Dr. Baruch's testimony and from your own—does it in any way assist you in forming a further opinion?

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A. It's interesting because it merely documents and buttresses what I had known, what I had assumed from my interview with Mr. Toussie.

Q. Well, explain what that means? A. What I was told was that, in this record, that the general practitioner first saw him at the age seven because he was behaving queerly, in a withdrawn—he wouldn't socialize. He was withdrawn. (389)

He was kind of intellectualistic. He was interested in abtuse subjects, etc., and in the last—the other important piece of data in there was that in the last year he had come to —last two years, I think in the testimony, he had come to Dr. Baruch for all sort of treatment, sometimes three times a day, on the basis of queer complaints which were what he presumed neurotic in nature.

Q. Now, talking about the word "drugs" as it was used here, discussing narcotic drugs such as opium, heroin, morphine, any of these?

Was this Defendant addicted to any of those? A. I don't know whether he was addicted to any drugs. As far as the drugs that we have discussed here, they are not narcotic drugs. I do not have a narcotic license, and yet I can prescribe these drugs in my practice.

Q. The drugs that you read about in the testimony of Dr. Baruch, who spelled some drugs out for us—I don't

remember their names—were any of those narcotic drugs? A. No. No, sir, not the ones—as far as I can remember. I'd have to look through the testimony again.

(390)

Q. As a result of the cross examination today and as a result of your reflection on the matter over the week-end, is there anything that occurred which would change your testimony concerning what your original diagnosis of this Mr. Robert Toussie is? A. Not substantially, sir.

Mr. Singer: Thank you, doctor.

The Court: Doctor, Dr. Baruch used the term schizophrenia and distinguished from that schizophrenic. Is there a valid distinction in psychiatry?

The Witness: I think he used the term schizoid, and that's—that's a description of a personality type that's very detached, withdrawn, usually associated with a certain constitution torn thin or daydreamers and withdrawn personalities; usually had difficulty with—as one of their problems they usually have difficulty relating to people.

Now, I wouldn't call him a schizoid in that sense. I would say that he had some problem with detachment. He had difficulty with relating. He said he was

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(391)

shy until the age of 20, but thereafter he was able to overcome his shyness, so, therefore, he felt he related better, and I felt that his main problems in relating were due to a fear of his aggressivity coming out in public and some anxiety about that.

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Robert I. Toussie—Defendant—Cross

(392)

ROBERT I. TOUSSIE, having been previously duly sworn, resumed the stand and testified further as follows:

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(393)

Cross examination by Mr. Rosen: (continued)

Q. Now, Mr. Toussie, you left off on Friday discussing your application to Columbia School of General Studies. Do you recall that, the application? A. Yes.

Q. Did there come a time when you applied to the Graduate School of Business? A. Yes.

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(395)

The Clerk: Four-page application marked for identification as Government's Exhibit 7.

(So marked)

By Mr. Rosen:

Q. Mr. Toussie, I show you Government's Exhibit 7 for identification.

Do you recognize this? A. Yes.

Q. Is that a copy of an application—of your application to the Columbia School of Graduate Studies? A. Yes.

Q. Mr. Toussie, were you asked in that application whether you had been treated by or seen physicians for mental disturbances within the past five years of that application?

Mr. Singer: I object to that as immaterial, irrelevant and certainly nothing within the issues here.

The Court: Is this a question you previously asked, Mr. Rosen?

Mr. Rosen: On a different application.

(396)

The Court: Overruled. I will allow it.

A. Yes, sir.

Q. Do you recall the answer that you gave to that question? A. "No."

Q. What was the answer? A. "No."

Q. Was that true, sir? A. No.

Q. Did you ever have a driver's license, Mr. Toussie? A. Yes.

Q. Where did you apply for your driver's licenses? A. New Jersey.

Q. Did you apply for a license in 1964? A. Yes, sir.

Mr. Rosen: May we have this marked, please?

The Clerk: One sheet marked for identification as Government's Exhibit 8.

(So marked.)

Q. Mr. Toussie, I show you Government's Exhibit 8 for

(397)

identification. Do you recognize it, sir? A. Yes.

Q. Is that your application for a driver's license made in 1964? A. Yes. I don't see the date, but yes.

Q. Is it to expire in 1967? A. Yes.

Q. Is it a three-year application? A. Yes.

Q. So you would have filed that in 1964; is that correct? A. That's correct, yes.

Q. Were you not asked whether you have any mental or physical disabilities, sir?

Mr. Singer: Excuse me.

A. I didn't notice.

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(398)

A. I don't see the question.

Yes.

Q. Your answer was "No," isn't that correct?

Mr. Singer: I object to it upon the ground that it is not inconsistent with his testimony here.

The Court: Overruled.

You will argue that to the Jury, Mr. Singer.

Overruled.

A. Yes.

Q. Your answer was "No"? A. Correct.

Q. Mr. Toussie, when did you first see a Dr. Dunkell? A. The exact date I'm not certain of, that it was mentioned earlier.

Q. Would it be January? A. Yes, of—

Q. 1967?

And at that time did you tell him what your occupation was? A. Yes, I assume so.

(399)

Q. What did you say your occupation was? A. I was a student then.

Q. Did you tell him you were a salesman? A. That was my previous occupation.

Q. No. I am asking you, on January 30, 1967, didn't you tell Dr. Dunkell that you were a salesman? A. That's what my business, the kind of work it was, but at that time I was a practicing student. But I told him what I had done, what my past—I was a salesman.

Q. You weren't a salesman on January 30, 1967; were you? A. Not at that date.

Q. By whom are you currently employed? A. Currently?

Q. Whom do you work for now? A. No one, although I do—well, I do work for Clinton Company, but that was only—I'm still a full-time student. That was only, supposedly, for a couple of week period, in the springtime.

Q. Do you support yourself, sir? A. Yes.

Q. And you don't work? A. No. I'm a full-time student. I—in other words, I don't have a full-time means of employment, if that's what he—I don't understand the ques-
(400)
tion.

I have no full-time employment. I'm a student full time. I go all day to school. I study at night.

Q. Mr. Toussie, did you ever hear of the Rapid American Corporation? A. Yes.

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I was associated with them, but the companies that—the group that I was with had purchased from Rapid American Company, but I had never worked for them.

Q. You were director of Rapid American Corporation? A. No.

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(401)

Q. What were the Toussie Family Industries? A. Nothing. It was just a name. There was no company that—

Q. You were vice president of that nothing; weren't you, sir? A. No.

Q. Mr. Toussie, when you were arrested on February 3, 1967, didn't you have a card in your pocket which said, "Toussie Family Industries, Robert I. Toussie, Vice President"? A. Yes.

Q. Well, were you vice president? A. No. It was not a

company. We had intended to form a company under that name and use that as a name, but we didn't. It was Irving Elias Company.

(402)

Q. Irving— A. Which I had mentioned earlier in the day.

Q. So there was no such company as Toussie Family Industries? A. Correct.

Q. And yet you had a business card which said you were vice president? A. Correct.

Q. Now, tell us about Irving Elias & Company. Had you worked for them? A. Yes.

Q. You were just an employee? A. I was an employee and also one of the principals.

Q. You owned fifty per cent of the stock; didn't you? A. No, I did not.

Q. You and your brother? A. At one point, yes.

Q. Did you ever hear of Associated Fashions? A. Yes.

Q. Did you ever have anything to do with Associated Fashions? A. Yes. Can I clarify this?

(403)

The Witness: Because these are all different names for the same thing.

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By Mr. Rosen:

Q. Now, you were associated with Associated Fashions; is that correct? A. Yes.

Q. Did you hold any position with that company? A. Yes.

Q. What position did you have? A. The actual title, I

believe, was Treasurer, but it was a title in form rather than—
(404)

Mr. Singer: Louder.

A. (Continuing) It was a title in form rather than in substance. I don't—

Q. You were the Vice President or Treasurer— A. Yes. Yes.

Q. —of Associated Fashions?

Did you ever hear of Princess Pat? A. Yes.

Q. You worked for them; didn't you? A. No. I worked for my brother, who worked for them.

Q. You worked for your brother who worked for Princess Pat? A. Right.

Q. So you never worked for Princess Pat? A. No, not directly.

Q. You were never an owner of Princess Pat? A. No.

Q. How about Merry Mights? Did you ever hear of Merry Mights? A. Yes.

Q. Is that one of your companies? A. Yes.

Q. Were you associated with that company at any particular position? A. Yes.
(405)

Q. What position did you have? A. Again, I'm not certain which title that—for that company. It was a form title.

Q. Were you a Director or Treasurer or President or Vice President of Merry Mights? A. I'm saying, I don't know.

The Court: Then say you do not know or you are not sure.

A. (continuing) I was a Vice President or its equivalent, let me say that.

Q. Did you ever hear of a firm called Gay Sprites? A. Yes.

Q. Were you ever associated with that firm? A. Yes.

Q. Were you ever in an executive capacity with that firm? A. In the same capacity as the previous.

Q. Same capacity? A. Right.

Q. Did you ever hear of Small Talk? A. Yes.

Q. Were you ever associated with that firm? A. In the (406)
same capacity.

Q. Same capacity, an Executive Vice President, something like that? A. Right.

Q. How about High Line? A. Same capacity.

Q. Same capacity. A. Correct.

Q. How about High Knits? A. Same capacity.

Q. You were the Vice President or Treasurer, something like that? A. Right.

Q. Did you ever hear of Friendly Sales Company? A. Yes.

Q. What was your relationship with Friendly Sales Company? Friendly Sales. A. I'm sorry. I thought he said—
No. What was my—I guess the same.

Q. Did you ever hear of Friendly Sales Company? A. I guess the same capacity.

Q. Did you ever hear of the company? A. Yes.

Q. Before you had a capacity with it? A. Yes. We had (407)
many companies that they had that the—the controller had that were production companies or sales companies of the same parent corporation, which was Irving Elias & Company.

The Court: But in all these companies—

The Witness: I had the same capacity.

The Court: (continuing)—you had some executive position; isn't that so?

The Witness: Yes.

The Court: You are not quite sure what the title was?

The Witness: That's correct.

The Court: All right.

Q. Mr. Toussie, weren't you in fact the Treasurer and Director of those companies that I just mentioned; the exact title, Treasurer and Director? A. Yes, sir.

Q. When did you graduate from Seth Low Junior High? A. In June of 1955.

Q. You say you were chosen as the valedictorian? A. Yes.

(408)

Q. Now, that's usually the number one student; is that correct? A. But I didn't deliver the speech.

Q. Yes. I heard. A. Yes.

Q. Were you the only one who was considered for valedictorian? A. No.

Q. In other words, they went to some of the top students and said "Prepare a speech and we will see"—A. Yes, I had mentioned that.

Q. —"whose is the best"; is that right? A. Yes.

Q. So yours wasn't the only speech that was handed into the faculty concerning the valedictorian? A. No.

Q. Is it your testimony that you were not selected to give that speech because the speech was too controversial? A. That's what I was told by the teacher.

Q. Which teacher? A. The one who acted as faculty.

Q. What's her name? A. I don't recall the name, although
(409)
it's her handwriting, I believe, that's on the—on the actual—

Q. Would you be able to recognize who it was from the handwriting? A. No, I wouldn't know the name of the teacher. She wasn't my teacher per se. I didn't have her for any class, but they had a whole group of the English Department and one of them acted as spokesman for it.

Q. Did she point to anything in your speech as to the portion that she objected to, or was it the whole thing? A. No. She had mentioned—she was very tactful, or she tried to be, when she was describing it. She said it was just the subject was too controversial, and she mentioned the issues in the—that I had written about, because that's what she wanted—they wanted me to alter. They didn't ask me to alter anything about the introduction or any—they told me that was fine.

Q. Is it your testimony, sir, that the teacher in Seth Low Junior High School told you that your thoughts about war, cancer and the war on injustice and bigotry was too controversial? A. No, sir.

Q. So it was the portion just on the war? A. On the war
(410)
and violence.

Q. Did she tell you it was too controversial to take a position of peace; was that it? A. That's the—she told me—I don't recall the exact words.

Q. No, I don't expect you to. A. But I know that the summary of it was that she told me that I had—if I altered the speech, that part of the speech that discussed what we should be doing, as to what our country was doing, then I could have been valedictorian.

Q. What was your country doing in 1955? Was it at war? A. No. When I said that there is no longer—when I was quoting these generals and the Presidents and saying what I genuinely believed, she—they didn't feel that that was the place to say it, to make that kind of a speech.

I believed that it was, because it was the message that you're supposed to give your fellow students as to what—how they should direct their futures, how they should plan their lives.

Mr. Rosen: Mr. Singer, I do not have the speech, the exhibit.

(411)

Mr. Singer: Yes.

Q. Did you type this yourself, Mr. Toussie, Defendant's Exhibit B in evidence? A. No.

Q. Who typed it for you? A. I don't know. I don't remember. It was thirteen years ago.

Q. But you found it after thirteen years; didn't you? A. I had saved it.

Q. Let me ask you, did you dictate this speech to someone or did you write it out? A. Handwritten. It was written out. We had to write this in class, incidentally. This speech was not written at home. In order—when we submitted for class valedictorian, they made us come to class and in the presence of the faculty, the entire speech had to be written and submitted then on the spot, so that there was no outside, you know, outside opinion.

Q. Who typed this up? A. That was subsequently—that I had it typed.

Q. Who typed it? A. I don't recall. It was thirteen years ago. But I didn't know how to type.

(412)

Q. Did you give— A. (continuing) Perhaps my sister.

Q. (continuing)—your original to someone to type? A. I assume so. I didn't dictate it. I assume it was given.

Q. So, in other words, you probably wrote it out on pieces of paper? A. Perhaps the school typed it. I don't know. Maybe the teacher had it submitted to someone to type.

Q. So, in other words, you wrote it out on paper; isn't that correct? A. Yes. It was handwritten in class.

Q. Yes.

Then this emerged as the typed document; is that correct? A. Yes.

Q. Where is the original that you wrote? Do you have that? A. No.

Q. Did you save that? A. No. There was no need to. I never thought that it would be of any significance except to myself.

Q. But that was—those were your original thoughts on

(413)

that paper. Wouldn't it be significant to you? A. They are identical to this. If you see my handwriting, you'll see why I'd keep the typed copy.

Q. Mr. Toussie, among the noble thoughts that are in this speech, I read you the following:

"I say yes, there'll always be wars. There's the war against cancer. There's the war against injustice everywhere. There's the war against bitter poverty that makes fully two-thirds of the population of the earth hungry for bread right now. There's the war against heart disease and there's that beautiful, wonderful war against bigotry."

Do you recall saying that? A. Excuse me?

Q. Do you recall writing that; don't you? A. Yes.

Q. And that's how you felt in 1955? A. Yes.

Q. Didn't you say:

"I hope to live a hundred years and to take a part in those wars until the day I die." A. Yes.

(414)

Q. Now, Mr. Toussie, do you belong to the American Cancer Society? A. No.

Q. How about the American Heart Association? A. No.

Q. Well, could you tell us how you've taken part in all these noble wars that you told us about in this speech. What have you done? A. Yes, I can.

I've always been of the belief that you do—you can accomplish a great deal more as an individual than as part of a group, because as part of a group a great deal gets lost and there's too much read tape and too much that gets lost in the process. And as an individual, I personally believe I've done a great deal in all these things. I've served as a—as an educator to many people who have come for all kinds of advice. I've tried to—I've always been an open—my presence has always been available to any human being of any sort that has ever come to me for my advice in any area that they thought that I was proficient in.

I've assisted students who did not have the funds for

(415)

their education, or because of various wars in different countries their funds were—I don't know the word that's used, but it was difficult for them to get funds out of their country, and I had offered to either lend or give them the money.

I have—I have given guarantees to the University that I go to of students who—they need—foreign students who come to this country to be educated have to get—if they run out of funds, they seek a loan from the university.

(416)

Q. Tell me what you did? A. I am saying what I did. And in order to get the funds they must get a guarantee from some residing person in the United Sttaes, so if for any reason they can't pay the funds I would be responsible for it.

And I had signed that for some of the people and I thought this was the way our country should be, the way we—

The Court: You have been described by one of the doctors as being withdrawn.

Do you believe that you are withdrawn?

The Witness: No.

The Court: You do not?

The Witness: No. I feel I was, but in many ways I tried to overcome it.

Where I couldn't do things I just had to because I knew it was the only way that I could possibly survive.

The Court: You meet a lot of people both business and socially, don't you?

The Witness: Yes, sir.

The Court: You meet students who need help?

(417)

The Witness: Yes.

The Court: You enjoy doing the things for students?

The witness: For all people, not only students.

The Court: You enjoy meeting people?

The Witness: Yes.

Q. Tell us about—

The Witness: Can I finish answering the question?

The Court: You answered yes.

The Witness: He asked me what I had done for these things.

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(418)

Q. Mr. Toussie, I believe that you had testified before you wrote this speech that you studied the works of Sigmund Freud and Albert Einstein; is that correct? A. Yes.

Q. Sigmund Freud was considered the father of psychology; isn't that right? A. Yes, by many. I have read many of his works, not all of them.

Q. Have you read all of his works? A. I couldn't comprehend all of them, I couldn't understand them all.

Q. You refer to a letter titled "Why War," 1929— A. No, not 1929.

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(419)

Q. Did you read the entire letter? A. Yes, I certainly did.

Q. Are you familiar with this passage from the letter?

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By Mr. Rosen:

Q This is the letter from Sigmund Freud to Albert Einstein that you testified about. A. To Albert Einstein.

(420)

Q. "We are told that in certain happy reasons of the earth where nature provides in abundance everything that man requires there are races whose life is passed in tranquility and who know neither compulsion or aggressiveness.

"I can scarcely believe it and I shall be glad to hear more of these fortunate beings. The Russian communists too hope to be able to cause human aggressiveness ot disappear by

guaranteeing the satisfaction of all material needs and by establishing equality in other respects among all the members of the community. That, in my opinion, is an illusion. They themselves are armed today with the most scrupulous care and not the least important of the methods by which they keep their supporters together is hatred of everyone beyond their frontiers."

Are you familiar with that passage? A. Yes.

Q. I will read you one further sentence.

The Court: Are you going to read a passage or are you going to ask a question based on it?

Mr. Rosen: I am going to ask a question based on

(421)

these two passages.

"It may be questioned whether a community ought not to have a right to dispose of individual lives. Every war is not open to condemnation to an equal degree. So long as there exists countries and nations that are prepared for the ruthless destruction of others, those others must be armed for war."

Are you familiar with this passage written by Sigmund Freud?

The Witness: Yes, I am.

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Q. Can you reconcile the passages that I just read to you with your thinking? A. Yes, I certainly can.

I believe that if it were interpreted the way it should be interpreted, and if it were not chosen out of context, you would see he is stating what the condition of the world is today. He is not saying what the condition of the world

(422)

should be. He was saying what—as it exists today.

He said, as I said, I don't believe that murder—I am not so innocent as to believe that murder is going to cease, but that it should not be legitimate.

He says that this is the condition of the world, but it is within his organic nature that he cannot have anything to do with violence, that he cannot have anything to do with war, that he cannot be a part of anything that would interfere with the rights of another human being. That is what he is saying.

The Court: Next question, Mr. Rosen.

Q. Mr. Toussie, you testified that you would have nothing to do with war; is that correct? A. That's correct.

Q. And that nothing to do with instrumentalities that may assist in war; is that correct? A. That's correct.

Q. Do you recall his Honor's question concerning payment of your income taxes? A. Yes.

Q. Do you own any stocks, Mr. Toussie? A. Yes.

(423)

Q. Do you own stocks in General Motors? A. Yes.

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Q. RCA? A. Yes.

Q. Are you aware that RCA, for example, provides electronic equipment to submarines and planes? A. Yes. I assume it does.

Q. How do you rationalize your ownership of these stocks in these corporations with not being able to participate in anything that assists in war; how do you explain your ownership of stock in these corporations? A. I don't have an answer because I am not—

The Court: All right.

The Witness: I am not in any way assisting them.

(424)

Q. You testified, I believe, that you had been seeing a psychiatrist for two and a half years prior—

The Court: You said you are not assisting—was that your answer?

The Witness: I said I didn't know.

The Court: I thought you said you were not assisting in any way by ownership of stock; isn't that what you said?

The Witness: No.

The Court: You did testify last Friday that the failure to do something was just as culpable as not affirmatively assisting, didn't you say that?

The Witness: The failure to do something—

The Court: People that remain quiet while injustices were going on were just as guilty as those that permitted the offenses. You said that?

The Witness: Yes.

The Court: All right.

(425)

Q. On a little different topic. You testified that you had been seeing a psychiatrist for about two and a half years prior to your visiting Dr. Dunkell; is that right? A. Yes.

Q. You saw him once a week for two-and a half years? A. That was sometimes, more frequently than that, and sometimes less.

Mr. Singer: I can't hear a word.

The Witness: Sometimes more frequently than that—

Q. But at least once a week for two and a half years? A. Yes.

Q. Would you call yourself a businessman, someone proficient in business? A. Yes.

Q. Do you have an accountant? A. Yes—no. Yes, yes, I do have.

Q. You have an accountant? A. Yes.

Q. Have you had an accountant for the last couple of years? A. Yes.

(426)

Q. Did this physician that treated you for two and a half years charge you for these visits? A. Yes.

Q. Once a week for two and a half years you paid for these visits? A. It wasn't exactly once a week. When I was explaining it to Dr. Dunkell, I was telling him that I had seen a doctor regularly and many times I would see him, for instance, three times in a week and then I would go and try and not have to see the doctor, to try and feel that I could—

Q. But you paid this doctor; is that correct? A. Yes.

Q. Did you ever deduct these medical expenses in any way? A. Not all the time. I think just sometimes.

Q. In other words, you had these—

Mr. Singer: Just a minute now. If we get involved in that—

The Court: I will charge the Jury that medical expenses are not always deductible and only in an exceptional case is a medical expense deductible. There is a relationship between the money spent for medical

(427)

expenses and gross income.

The Witness: I don't think that I did then. I think I didn't. I didn't.

Q. Mr. Toussie, have you ever flown in a plane? A. Yes.

Q. More than once? A. Yes.

(428)

Q. Will you tell us about how many times? A. About six times.

Q. Did you ever ride in a boat? A. Yes.

Q. Did you ever own a boat? A. Yes.

Q. Do you own a boat now? A. Yes.

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Q. Do you drive a car? A. Yes.

Q. How long have you driven a car? A. Since I was 17.

Q. Is that when you got your first license? A. Yes.

The Court: Were you ever in an automobile accident?

The Witness: Yes.

The Court: A serious accident?

(429)

The Witness: No one was ever injured seriously.

The Court: What was your reaction when you were in the accident, anything that you considered abnormal, intense fear or normal fears?

The Witness: I ran immediately—I ran over immediately to the people and asked if anything was wrong and I tried to help, and I called the police and the ambulance to see—

The Court: Were you concerned about yourself at all?

The Witness: Not as much as I was concerned for the other people. No.

Robert I. Toussie—Defendant—Cross

Q. Subsequent to the accident, you did drive your car, didn't you? A. Yes.

Q. You have driven ever since? A. Yes.

Q. What kind of a car did you have? A. Now?

Q. Yes, now. A. Cadillac.

(430)

Q. Did you ever have a Mazzeratti? A. Yes. Well—we are not sure if it is my brother or myself, which is going to take which one.

Q. Did you ever drive it? A. Yes.

Q. It is a pretty fast car, isn't it?

Mr. Singer: I can't hear either of you.

A. A car is only as fast as it's driver.

Mr. Singer: I object.

The Court: Objection sustained.

Q. Tell us some of your hobbies, Mr. Toussie, do you swim? A. Yes.

Q. Have you ever gone out into the ocean, swim out there? A. Yes.

Q. Did you ever drive at night? A. My car, yes.

Q. Did you ever pull out of the lane and pass another car? A. Yes.

Q. Did you ever ride a bicycle? A. Yes.

(431)

Q. Did you ever ride a bicycle in traffic? A. Yes, I earned my living on a bicycle.

The Court: You say you earned your living that way?

The Witness: For many years.

The Court: Going house to house, you mean?

The Witness: Yes.

The Court: Was there ever any fear while you were driving that a car might run you down?

The Witness: There was always a fear.

Q. And yet you did it? A. Yes. I was hit once. It was a great fear.

The Court: Was it a serious injury?

The Witness: No.

The Court: How soon after you were hit did you again ride your bicycle?

The Witness: Not for a while.

The Court: How long?

The Witness: Two or three months. I was very scared.

The Court: Did you ride it on the sidewalk?

(432)

The Witness: As often as I can, yes. In fact, that's what I did, I used to go on the sidewalk and stop and cross and the bicycle used to fall all the time because it was top heavy in front and it wasn't supposed to go down any curb.

The Court: All right.

Q. Concerning the situation with Selective Service, Mr. Toussie, how long before your 18th birthday did you know about or hear about Selective Service? A. I heard of the Army more than Selective Service. In other words, not the particular term, but I heard of Armies and war.

Q. You testified that you didn't register for the draft? A. Yes.

Q. You didn't register for Selective Service? A. Yes.

Q. When did you first learn that you had to register, if you can tell me?

The Court: Whether it was prior or after your 18th birthday?

The Witness: Prior.

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(433)

Q. Tell us about when. A. No, I don't know at what point you begin to learn this.

The Court: Did you know which draft board had jurisdiction over your area at the time you reached your 18th birthday?

The Witness: No, because I never really discussed it with people, but I assume that it was the one in Coney Island, but I never talked with—about the draft with my friends; I never talked about anything at all to do with it. I never said anything about it to them.

Q. You went to the draft board in Coney Island, though? A. Yes.

Q. From 1959 until February 3, 1967, did you make contact with the Selective Service in any way? A. No.

Q. You felt that you could not register; is that correct,

(434)

sir? A. Yes.

Q. Did you approach them and tell them that you could not register? A. No, I couldn't.

Q. I didn't hear that last word, no you couldn't or you didn't? A. I couldn't because—

Q. You couldn't tell them that you couldn't register?

A. Yes, because there was no provision for it. As Colonel Akst stated.

Q. When you received those forms from Selective Service, the inquiry forms, did you explain your feelings to Selective Service and told them about it? A. No.

Q. What did you do when you received those forms from Selective Service? A. When you say "forms" I am not following what you mean now.

Q. It has been a few days.

Mr. Singer: Excuse me. While you are asking it, I have found the actual form, if you want to use it,

(435)

because I was going to offer it in evidence.

The Court: Suppose you mark it for identification at this point as a Defendant's Exhibit for identification.

Mr. Singer: Mark it as my Exhibit.

The one from January 20th.

The Clerk: One card marked for identification. This is dated January 20th, 1967. Mark that as Defendant's Exhibit D for identification.

(So marked.)

The Court: Did you know when you reached your 18th birthday that the rules and regulations of the Selective Service System provided for exemption from service for a conscientious objector; did you know that?

The Witness: For conscientious objectors?

The Court: Yes.

The Witness: It depended on what—well, I knew that but not—

(436)

The Court: Without understanding the definition of what a conscientious objector is, did you know when you reached your 18th birthday that the rules and regulations provided for exemption from service for conscientious objectors, exemption from service in the Army for conscientious objectors?

The Witness: Yes.

The Court: You knew that?

The Witness: Yes, but I also knew that—

The Court: That is all I asked.

The Witness: I am sorry.

Q. You say that you knew that there was no place for you in Selective Service? A. No, I—

Q. No classification for you? A. I knew there was no place—no provision to in any way discuss how you felt about registration as being part of—no true conscientious objector or pacifist could ever even take the first step which is registration and there is no provision for that.

The only provision for that is my being here right now.

(437)

The Court: What is a true conscientious objector, only your type; is that what you are saying?

The Witness: I believe personally that a true conscientious objector cannot even take the first step of registration.

The Court: You do know that there are Selective Service registrants who are classified as conscientious objectors, you do know that?

The Witness: Yes.

The Court: But you say they are not true conscientious objectors?

The Witness: That is true.

Robert I. Toussie—Defendant—Cross

Q. How did you know that when you were 18, did you read the Selective Service law in any way? A. How did I know what?

Q. That there was no provision for you in the Selective Service law; how did you know that? A. Yes, I knew the only way is to register and then claim provision, and then you are before a military group that decides as to whether you are a conscientious objector or not. But there was no way for me to speak to people that may have felt like I do—

(438)

Q. Don't you know the Draft Board members are civilians?

* * * * *

The Witness: Yes.

(439)

Q. I asked you before when you received the form, the inquiry form—A. Yes.

Q. —what did you do? A. I went to my lawyer.

Q. You went to your lawyer? A. Yes.

Q. Did you discuss with any doctors whether you should approach Selective Service and tell them your problem? A. One doctor had asked me once when I had gone to him, Dr. Burson, whose name has not come up here yet, who is a psychiatrist—

* * * * *

(440)

The Witness: He asked me, when I had gone to see him, when one of the doctors I was seeing was on vacation and I was very frightened of what I was thinking of at that time and I had to see another doctor. I went to Dr. Burson. This was years before the indictment came.

(441)

He asked me, "Are you here because of the Army? Are you having any trouble with the Army?"

And I said, "No, not at all." That's all.

By Mr. Rosen:

Q. Isn't it true that you waited until Selective Service found out about you to take some action concerning your draft status? A. Yes. It was just a personal thing.

Q. The first person you went to was a lawyer and not a doctor? A. Yes.

Q. Now, you heard Col. Akst testify that your name was called to his attention—to the attention of his headquarters; didn't you hear that? A. Yes.

Q. Did you call your name to the Board's attention? A. No.

Q. You were not the one who called it to their attention? A. No.

(442)

The Court: Do you recall when you received the first notice from the Selective Service System that they were inquiring into your failure to register as to what your state of mind was at that time upon receiving the notice?

The Witness: Yes. I wasn't really—I wasn't really excited or nervous or anything like that.

The Court: You don't remember any marked change in your state of mind or emotional feeling?

The Witness: No. Dr. Dunkell said—I didn't feel that way. It was something I always believed. It wasn't new to me that I felt this way.

The Court: Is it something you expected sooner or later?

The Witness: It didn't matter. It didn't matter either way.

Q. Do you know anyone who has ever been classified as a conscientous objector? A. No.

(443)

Q. You testified that you were acquainted mostly with CO's through your reading? A. Yes.

Q. But you know of no one who is a conscientious objector, personally? A. They may be, but I don't know, because I never discussed this with them; I never discussed my beliefs with anybody.

Q. Do you know what obligations a conscientious objector has when he registers? Does he go into the Army? A. Does he go into the Army?

Q. Yes. A. No, not necessarily.

Q. Is a conscientious objector— A. It could have other provisions.

Q. Is he sent to a hospital? A. He can be sent to other forms also, civilian service, but I am opposed to that also because I feel what a person is doing then is just acquiescing to the State, and when a person, when States now dictate or try to give the impression of unanimity, that there is all oneness, and no opposition within a country, and that what they would call in quotation marks "wrong thinkers," as

(444)

soon as you register you are conforming and you are agreeing that you believe in their principles.

Q. Mr. Toussie, after writing that speech that was read to this Jury, you are opposed to serving in a civilian capacity in a hospital? A. Yes, sir, if it assists the military.

Q. How is it assisting the military? A. A declaration of assistance, conforming to what the military is asking.

Q. I beg your pardon, Mr. Toussie; where does the military ask you to serve in civilian work? Isn't it a law of this

country that says you do civilian work if you are a conscientious objector? A. You are assisting the military. I am not assisting the military.

Q. You say you assist the military if you work in a hospital? A. Yes, assisting in more—

Q. Let me ask you the question. Are you assisting the military in working in a camp for retarded children as a conscientious objector? A. If it is military—

The Court: A non-military hospital.

The Witness: As a result of registration you are

(445)

assisting the military.

The Court: You say it is a registration that is the acquiescence and not the type service?

The Witness: The act of registration. You can't take that first step, because that is the acquiescence of agreeing with their policies, because it shows that there is no—what it does, it eliminates opposition and makes it seem to other people that nobody else should ever oppose war or military, because they think that there is nobody—you know, that their voices won't be heard.

The Court: Did you ever own Defense Bonds, Mr. Toussie, U.S. Government Bonds?

The Witness: I may have gotten it as a present as a young boy, Bar Mitzvah.

The Court: That's all?

The Witness: Yes.

(446)

The Court: Never bought any?

The Witness: No.

The Court: The answer is No.

Robert I. Toussie—Defendant—Cross

Q. Do you own any other bonds, Mr. Toussie, Treasury Bonds? A. Yes.

Q. You own quite a lot of Treasury Bonds, didn't you? A. Yes. Because I definitely love my country and that has nothing at all to do with my country. My feelings on war are not my feelings toward my country.

The fact that I own these Treasury Bonds shows that I feel for my—my feelings towards my country.

Q. You wouldn't defend this country, would you, if it was attacked? A. I defend my country every day of my life.

Q. Would you defend this country if it was attacked? A. No, not in a war-like manner.

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(448)

Q. Now, sir, is it your testimony that certain members of your community, or your community, regards themselves as pacifists? A. Yes.

Q. Is that true? A. Yes.

Q. Are you telling us that your community feels that they
(449)
don't have to register for the draft? A. No.

Q. Now, Mr. Toussie, you made certain reference to the Bible in your direct testimony, did you not? A.Yes.

Q. Well, are you familiar with the Bible? A. You mean, can I recall—

Q. No. Have you read the Bible? A. No.

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Q. Mr. Toussie, were you required at Columbia University to take a proficiency exam in a certain subject which would have qualified you or kept you from taking certain
(450)
courses? A. Are you required to take a proficiency—

Robert I. Toussie—Defendant—Redirect

Q. Did you ever take a proficiency examination at Columbia? A. That would exempt me from taking other courses, no.

Q. Did you ever take any proficiency examination? A. No —I guess—if you would call the admission to the University proficiency exam, yes.

The Court: They are entrance exams.

Mr. Rosen is thinking of exams that exempt you from taking the beginner's courses so that you may continue in the advanced courses.

The Witness: No.

The Court: You have never taken any of those?

The Witness: No.

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Redirect Examination by Mr. Singer:

Q. Now, you were asked on cross examination, either on cross examination or my direct, I don't remember, I think it was on cross, whether or not you had received notice at your home from the Draft Board with an inquiry about whether or not you registered.

Now, I show you Exhibit D for identification, did that paper come to your house? A. Yes.

Q. Was that called to your attention after it came to your house? A. Yes.

Q. Was that paper the first notice that you had received? A. Yes.

(461)

Q. Or it was called to your attention, is that correct? A. Yes.

Mr. Singer: I offer it in evidence.

The Court: Any objection?

Mr. Rosen: No, sir.

The Court: Let it be marked.

Mr. Singer: It is marked Exhibit D for identification.

The Court: If there is no objection, let it be marked in evidence.

Mr. Singer: And I want to point out, purely, your Honor, that this paper still bears the address of 2111—

The Witness: 14.

Mr. Singer: —2114 East 5th Street, and there has been no change.

The Clerk: So marked, Defendant's Exhibit D in evidence.

(So marked.)

Q. Now, there was talk here about Mr. Field—you have heard the testimony here, purely, that Mr. Field went to see Colonel Akst; did that occur before or after you first saw (462)
Mr. Field? A. That occurred before I saw Mr. Field.

Q. Now, had you suggested to Mr. Field that he send you to a psychiatrist? A. No.

Q. Whose idea was it? A. Mr. Field.

Q. Now, you mentioned a man this morning, a Dr. Berson—how do you spell it? A. B-E-R-S-O-N, Berson.

Q. And where is his office? A. It is located near Dr. Lapofsky. I am not certain of the exact address, Buckminister Road, I believe.

Q. And how many years ago was it that you went to see Dr. Berson? A. About two and a half years ago, three years ago.

Robert I. Toussie—Defendant—Redirect

Q. And was that at a time—you mentioned something about vacation? A. Yes.

Q. What did you mean by that? A. Dr. Lapofsky was on vacation at the time, and I wanted to see a doctor, so I called his service, and they said that this doctor was on call; so I went to Dr. Berson who I had never seen before.
(463)

Q. Was this before this visit to Dr. Berson and the visit to Dr. Lapofsky—did this occur before December— A. Yes.

Q. —1966? A. Yes.

Q. Now, then, did you go see a doctor since this trial has begun? A. No.

Q. Yes, you did, Saturday. A. Oh, yes, I am sorry. The Government's doctor, Saturday.

Q. You went to a doctor voluntarily? A. Yes.

Q. A doctor whom the Government had selected? A. Right.

Q. To examine you? A. Right.

Q. And did you talk to that doctor? A. Yes.

Q. How much time did you spend with him? A. A few hours.

Q. About how many hours? A. About two and a half
(464)
hours.

Q. Was it all done Saturday morning? A. Yes, Saturday morning.

Q. Did you openly tell the doctor everything that he asked you, and did you answer all the questions? A. Yes.

Q. Now, tell me, do you think that you are capable of conforming your conduct to law? A. Yes.

Q. Have you wanted a defense put in here which affects your mental ability? A. No.

Joseph Bigio—for Defendant—Direct

Mr. Rosen: Objection.
The Court: Overruled. I will allow it.

A. Definitely not.

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(465)

JOSEPH BIGIO, called as a witness, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Mr. Singer:

Q. Mr. Bigio, where do you live? A. 2250 East 4th Street, Brooklyn, New York.

Q. Where is that, in Brooklyn? A. Yes, Brooklyn, New York.

Q. And you have lived in that area a number of years? A. In that particular address, the past four years.

Q. Now, what business are you presently in? A. I am, for the past four years, own a Chicken Delight store, franchise.

Q. Do you know Mr. Robert Toussie? A. Yes.

Q. You and he belong to the same synagogue? A. Yes.

Q. And do you know other people who know him? A. Yes.

(466)

Q. How long do you know Mr. Toussie? A. I know Mr. Robert Toussie ever since he was about five, six years old.

Q. Well, did there come a time when you operated some company which was in the business of selling children's clothes? A. Yes, sir, the name—we manufactured baby wear, infant's and children's wear, the name is Princess Pat Panty Company, and, also, Princess Pat Knitwear.

Q. You knew, did you not—well, did the Defendant's, Mr. Toussie's brother work for you? A. Yes. He became, eventually, one of the best salesmen we had.

Q. And did you know that Robert worked for Toussie while he was working for you? A. Yes.

Q. And did you have any other business dealings with Mr. Robert Toussie? A. Yes. In 19—

Q. No. I don't want the history because I am not concerned with the actual business dealings.

Did you have business dealings with him?

The Court: Mr. Singer just wants a yes or no.

(467)

A. I can't—yes.

Q. I just want the yes or no. I don't want the details of it. This is a strictly limited inquiry.

Perhaps you don't appreciate it, but please accept my work that it is. A. Yes.

Q. Now, over the years that you have known Mr. Robert Toussie, have you known other people who knew him, either in business, socially, or in the temple? A. Yes, naturally.

Q. Now, have you ever had the opportunity over the years, to discuss Robzert Toussie's reputation for honesty, for truthfulness, and integrity with the people who knew him? A. Yes.

Q. What is his reputation for those qualities? A. I would say excellent.

Mr. Singer: That's all.

The Court: Mr. Rosen.

Joseph Bigio—for Defendant—Cross
David Hanon—for Defendant—Direct

Cross Examination by Mr. Rosen:

(468)

Q. You say you saw Mr. Toussie at the synagogue? A. I beg your pardon.

Q. You say you used to see him at synagogue, is that right? A. Many places. I visited his home many times.

Q. Did you see him at the synagogue? A. Exactly at synagogue, perhaps no, but—

Q. Thank you. No further. A. (Continuing) I didn't attend many times.

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(469)

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DAVID HANON, called as a witness, having first duly affirmed to tell the truth, was examined and testified as follows:

* * * * *

Direct examination by Mr. Singer:

Q. Mr. Hanon, what is your present occupation? A. I am a physicist with IBM.

Q. For how many years have you been with IBM? A. I have been with IBM for approximately five and a half years.

(470)

Q. And before that time, are you a graduate from any schools? A. Yes. I have a bachelor's in science, in physics, and mathematics, from Brooklyn College, and I have done graduate work at Syracuse University in physics and mathematics.

Q. Now, where did you live? A. Well—

David Hanon—for Defendant—Direct

Q. Where did you live years ago, when you were growing up? A. Several years ago I was at 1434 Ocean Parkway, which I spent three years in Poughkeepsie, New York, while working for IBM.

Q. Now, over the years, have you known Robert Toussie? A. Yes, I have known him.

Q. How many years have you known him? A. Well, at least eight or ten years.

We go back together to high school level, at least, I can recall, and, maybe even before, eight or ten, at least.

Q. And do you know other people who know him? A. Many. We travel in the same group of friends, and we see one another socially quite often, and I have spent many, (471)
many good times with Bob.

Q. Now, have you ever discussed Bob's reputation for honesty, for truthfulness, and integrity with those who know him? A. Well, I know Bob to be an honest, truthful and—

The Court: No, not your—

Q. What do others say about him? A. I would say, in general, that he has an excellent reputation for honesty and truthfulness.

I would say he has one of the most outstanding reputations, as far as I can determine.

* * * * *

(472)

SAUL M. ANCONA, residing at 1965 East 2nd Street, Brooklyn, New York, called as a witness, having been first duly sworn by the Clerk of the Court was examined and testified as follows:

Direct examination by Mr. Singer:

Q. Mr. Ancona, did you say you lived in Brooklyn? A. Yes.

Q. And what part of Brooklyn? A. 1965 East 2nd Street.

Q. Is that the area where Mr. Toussie lives? A. Yes.

Q. What business are you in? A. Real estate management.

Q. And are you also engaged in any other business? A. Yes, I am.

Q. What other business? A. I own a retail store.

Q. What kind? A.TV's and radio, things like that.

(473)

Q. Now, have you lived in the Brooklyn community for a number of years, in this Brooklyn community where Mr. Toussie lives? A. I have.

Q. Do you know other people who know him? A. I do.

Q. Do you belong to the same Temple? A. Yes, I do.

Q. And have you over the years discussed his reputation for honesty and truthfulness and for integrity? A. I have.

Q. What is his reputation for these qualities? A. To be honest, truthful and very decent person.

Mr. Singer: That's all.

Cross Examination by Mr. Rosen:

Q. Just one question, you registered for the Selective Service, haven't you? A. Yes.

Q. That's all.

Mr. Singer: And with that the defendant rests.

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(474)

Mr. Singer: We were already to go right on.

Now, I can, if you want me to, I will renew all the motions that I made at the close of the—

The Court: Well, at the end of the Government's case.

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EDWARD F. FALSEY, 142 Joralemon Street, Brooklyn, New York, called as a witness, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination by Mr. Rosen:

Q. Dr. Falsey, what is your profession? A. I am a physi-
(475)
cian specializing in psychiatry.

Q. Can you tell us something about your qualifications, sir? A. Yes, sir.

I was graduated from the Yale University, School of Medicine, in 1953.

I completed a rotating internship at Kings County Hospital and had special study in nervous and mental disease at the following institutions:

First. At the Rhode Island State Hospital for Mental Diseases, where I was junior intern.

Then at the Butler Hospital in Providence, Rhode Island, where I was intern.

After the internship at Kings County, I went as asso-

ciate resident physician in psychiatry to the Memorial Hospital in Rochester, New York, where I taught a year as instructor in psychiatry.

Then I went on fellowship to the Institute of Pennsylvania Hospital in Philadelphia, and from there to New York Hospital in White Plains, the Westchester Division.

In 1940, I came to Brooklyn, where I became associated primarily with two places, one, the Long Island College Hospital where I am now director of psychiatry, and the
(476)
second the Long Island College of Medicine which subsequently became the State University, School of Medicine, where I became professor of psychiatry, and in each of the latter two institutions I still occupy these posts.

I am a fellow of the American Medical Association, fellow of the American Psychiatry Association, past president of The Brooklyn Psychiatric Association, and that's about it.

Q. Doctor, did you examine the defendant, Robert Toussie? A. Yes, sir, I did.

Q. Will you tell us at whose request—did the Government ask you to examine him? A. At the request of the United States Attorney.

Q. When did you examine him? A. I saw in an extended interview on September 5th.

Q. That was Saturday? A. That's right, two days ago.

The Court: My calendar says December 5th is a Thursday.

Do you mean September 7th?

The Witness: I am sorry. September 7th. I'm sorry.

(477)

This is an error in my report.

Edward F. Falsey—for Government—Direct

Q. Doctor, are you getting a fee for your examination and your testimony? A. Yes, sir, I am.

Mr. Singer: Oh, that's—really, I am not interested in that, and I assume he is, and I hope it is good.

It won't influence his opinion, I take an oath on that.

Q. Doctor, what material did you have available to you at the time of your examination? A. At the time of my examination, I had available to me an abstract of the Court record in this case, including Dr. Dunkell's testimony concerning his examination of the defendant.

Q. Did you also have any records of Dr. Dunkell? A. I had none of Dr. Dunkell's records.

I looked at the background information that was provided for me in documents relating to this man's earlier educational career.

Q. Doctor, did you agree with the diagnosis formation of Dr. Dunkell? A. I would agree that the defendant was in an anxiety state.

(478)

In addition, I would suggest that he has a personality pattern disturbance.

Q. Now, what other aspects of defendant's problem would you be inclined to emphasize? A. He reviewed his background with me in great detail, said that his father, Isaac, now 64, had been a peddler of vacuum cleaners, that his mother was a woman who had no formal education.

He was the third of four siblings.

Significant in this family is the fact that none of them moved very far away from the paternal establishment.

Edward F. Falsey—for Government—Direct

There is a brother, Sam, who is married, and he lives in the same house with the parents.

There's a sister who is married and lives two blocks away from the parental home.

There's a brother, Michael, who lives at home, going to Bernard Baruch College.

From his own accounts, the defendant was always physically well, albeit somewhat concerned about the hereditary prejudice which he felt was incurred from his father's hypertension.

His father is extremely religious, he said, and he himself had to support the whole family because the grandfather
(479)
of the defendant left Syria to avoid military service.

Robert Toussie's father had a stroke a few years ago, and has emphysema.

He started school at P. S. 247 in Bay Parkway, where he got all A's in subject matter and U in conduct.

During the grammer school period his unsatisfactory behavior amounted to overtalkativeness and sliding down the bannister.

He reported he was influenced by an aunt Sylvia whom he says was a very nervous person, and he used to think that his mother was doing to die.

He worked from the time he was an adolescent, peddling children's clothes, but managed to graduate from Lafayette High School at the age of 16 years in 1957.

He then applied himself intently to his business.

Now, he developed this story, too.

He said, "For some time he had anxiety symptoms. He was in treatment with Dr. Lapofsky and Dr. Berson in Brooklyn.

Throughout his entire life he convinced people, including his parents, that he would rather kill himself than anyone else.

(479a)

He said he didn't hunt or fish on the basis of being disinclined to injure anyone.

That's about the contents of the interview I had with him.

(480)

Q. And this is what he told you? A. This is what he told me.

Q. I see.

Well, diagnostically, Doctor, what category would you consider his conduct to follow? A. I think he falls into this category of a personality pattern disturbance.

The exact category beyond that in the classification, I think, is an academic question, really.

I don't think he is psychotic. I don't think he has a classical neurosis.

Q. Now, Doctor, do you have a professional opinion that you can state with reasonable certainty concerning the effect of Mr. Toussie's disturbance on his capacity to conform to the law and registering for the draft; do you have an opinion? A. Yes, I do.

Q. Now, would you state that opinion for us? A. I think this man could have registered for the draft.

Q. Well, you say he has this anxiety. A. That's right.

Q. Is it an anxiety reaction? I'm not sure of the words, anxiety reaction? A. He has anxiety symptoms.

(481)

Q. I see.

Now, is this rare? Is this something that is rare in a young man of today? A. No, sir.

Q. Is the fear of death unusual, Doctor? A. The fear of death, at the intensity that he experiences it, is somewhat unusual.

Q. Now, Doctor, if some of the items which were reported to you by Mr. Toussie on Saturday were exaggerated, or, perhaps, not true, would it affect your opinion? A. No, sir.

Mr. Rosen: Mr. Singer.

Cross examination by Mr. Singer:

Q. Tell me, Doctor, when you examine a man, you don't examine him as a layman would; do you? A. No, sir.

Q. You take to this examination—you bring with you all of these years of experience and training that you have described to us; isn't that true? A. That's true.

(482)

Q. So that you set yourself up, honesty, as you would in the profession as being able to distinguish, to some degree, the difference between the man who exaggerates or lies to you and one who you are willing to accept what he says? A. That's right.

Q. Is that true? A. That's true.

Q. Did you find on the part of this Mr. Toussie any effort to try to convince you that he was insane? A. No, sir.

In point of fact, he represented some grievance that this issue had been introduced into the case by yourself.

He said that he had not anticipated this defense.

Q. And as far as he felt, did he tell you that he thought that he was—well, perhaps I will use my phrase—as normal as apple pie? A. He didn't use that particular—

Q. No. I assume he wouldn't. A. (continuing)—that particular expression.

Q. But was that the expression he was trying to create?

(483)

A. The impression that he made was that he thought he was smarter than anybody, and this, of course, is essential,

that he preserve some pretense that omniscience and omnipotence to go forth as he does with a selling job.

He is much smarter than the person to whom he is selling, and he cannot drop this technique by any volutional effort in an interview.

Q. So that he is unique in some regards? A. This is correct.

Q. Now, would you say he has the kind of a condition that would remain stable at this point, or would it get worse as time goes on? A. I think this is a condition that has prevailed in this man for many years.

I don't think it necessarily leads to deterioration, or it becomes more aggravated with time.

This is his technique that he displays in the way he handles people, and it is a successful one in certain situations.

Q. He believes that it is successful in all— A. This is the problem, he does.

Q. That's right. It is at this point that he starts to separate himself from reality? A. This has to do with the
(484)
real diagnostic question as to whether or not he is paranoid to the degree that he might be committed. I don't think so.

Q. Well, I am not assuming that he will be committed. What I am assuming is that when he arrives at this point where he believes he is omnipotent, that he is smarter than everybody else, and that what he does is right, even though nobody else might agree with him, he puts, more or less, shall I put it in my way as a layman, as an antisocial person? A. I don't think he is antisocial in the sense of having intense hostility that he would acknowledge or even experience toward other people.

Q. I don't mean antisocial as with regard person-to-person, but I mean with respect to things that he believes were

according to his standards, for example, his killing, dread of killing, do you believe that's a genuine feeling on his part?

I am just interested in—I just want to know. A. I think it is genuine.

Q. Because you can appreciate, sir, that I undertook to offer this defense against this man's will, so I am interested in finding out what an expert might feel about it.
(484a)

Do you feel that this is a conscious act, a deliberate act on his part? A. I think that he consciously employs these devices which are almost automatic in his behavior and which have brought him a good deal of success, as he describes it, and he is quite proud of himself.
(485)

Q. Perhaps he should be in those regards. A. I would suggest that he should be.

Q. Now, does he have pride in this particular act of not registering or has it become, in plain words, an obsession with him? A. He has a kind of pride in feeling that for him the usual rules do not apply here.

He is not like anybody else in this particular circumstance. I tried to draw him into a situation where he would describe his reaction to other civil requirements on a person, such as the requirement to stop at a red light. He denies that he would violate this.

Q. It is interesting that the Court asked the same question this morning.

The Court: As a matter of fact, counsel asked that one. I asked one about paying income taxes.

The Witness: He would pay his income tax, I think, and I don't think it would occur to him not to

because money to him is not that hard to make or get.

Q. It isn't the thought of money? A. No.

(486)

Q. Tell me, having been in the Army myself, tell me, would he be the kind of person who ought to be next to me if I were in the Army? A. I don't think this is at issue.

The Court: Objection sustained.

You said it wasn't at issue and you are perfectly right.

The Witness: I don't think this is in issue. I saw this man at the request of the Government.

The Court: I sustained objection to that question, Doctor.

Q. I will ask it in another way: Have you ever done any work for the Selective Service Board or Boards anywheres in the country? A. I, during the early years of World War II, was a psychiatric examiner at the induction station at Fort Jay.

I also worked at Grand Central Palace for awhile in that capacity.

Q. Tell me, if you found a person as you found this Defendant—you had arrived at the conclusion that what he tells you is the truth, would you think that he should be accepted into the Service?

Mr. Rosen: Objection.

(487)

The Court: Objection sustained.

The question is not whether he would make a good or bad soldier. The question is whether he had

mental capacity to commit the crime charged and to conform his conduct to the law.

Mr. Singer: I except your Honor's ruling and object to it, but I didn't want to say that the fact that I want to raise any discussion about it now means I am dropping it.

The Court: You can have the discussion now. I will excuse the Jury.

Mr. Singer: I except your Honor's refusal to let me ask the question.

By Mr. Singer:

Q. Now, then, tell me, did he describe these various medicines that he had been taking? A. He alluded to his ingestion of some medication, but I don't have in the record any detailed account of how much he took or of what tranquillizers he had availed himself.

(488)

Q. According to the testimony—and I am not attempting to give it all—according to the testimony of both doctors who testified here, it seems that for a period of time, at least, in his life, he was the kind of a person who was either very high and had to take depressants, or very low, depressed, and had to take exhilarants.

Is this the usual pattern of a person who has that personality difficulty? A. There is in Brooklyn, I would suggest, a large incidence of people who have to have ups or downs.

The number of pills that float around town is tremendous and I don't think the availability of these things is necessarily a happenstance. It relates to the requirements of a whole host of people that they have something to turn them

on, something to maintain them when—you know, this is the way it is.

Q. Since I don't understand—well, I don't want to comment about myself, but all of us relate all questions to ourselves, and perhaps that is a psychiatric expression on my part, how would you—did he tell you about his problems with the doctor where he would, if he had a pain in his arm, he would complain that he had heart disease or he would actually show up with rapid heart beat; did he tell you
(489)
that? A. No, sir.

Q. Well, now, one doctor, Dr. Baruch, has testified that that occurred and he also related an incident concerning some chafing, I would describe it, to put it in its mildest form, between the legs, as most men have, or some men have, and a complete morbid fear on the part of this Defendant years ago that he had cancer.

Now, are these the actions of ordinary normal people? A. No, sir.

Q. These are abnormalities? A. Yes.

Q. And the fact that they were not disclosed to you deprived you of an opportunity to pass on them at the time you were making your diagnosis on Saturday?

The Court: Is that a question?

Mr. Singer: Yes.

The Court: Assume that the facts that Mr. Singer related were true, would that change your opinion?

The Witness: No, sir.

Q. But you have not considered them? A. No.
(490)

Q. But they are not, as I say, they are not the actions of normal people? A. No, sir.

Q. This introspection with regard to this—this fear of death that comes with it, brings with it, does it not, this great interest in health, personal health of the individual? A. This is correct.

Q. So that he tends to exaggerate every little illness into something of a serious nature? A. Yes.

Q. Such actions on the part of the individual, which appear over a period of, let's say, ten or twelve years, actually become a part of the pattern of life, do they not? A. In the sense of comprising part of the character structure, yes.

Q. Yes. So that you cannot take in your diagnosis or in any psychiatric diagnosis, you have to take into consideration many, many factors on which historical significance is based and on which you are not able to verify; is that correct? A. That's true.

(491)

Q. So it is not just a determination of whether a man says he had a bad dream or he had nightmares; no one can tell you whether a man really had a nightmare, can they? A. He can tell.

Q. Unless you happen to be there when he was having it. A. That's right.

Q. Or you had a witness when he woke up, isn't that true, who could describe what happened while he was asleep? A. That's true.

Q. So that in essence the whole art of the profession of psychiatry involves the ability of the doctor to distinguish between fantasy and truth, and even if it is fantasy, to determine what effect the fantasy really has on the individual who is pretending that things occur; isn't that so? A. I will follow you on it, yes.

Q. Perhaps I am giving a layman's viewpoint about it. A. I appreciate it, because the problem is to communicate

to laymen exactly what is transpiring. This is a really difficult situation.

(492)

Q. Yet there is a basic reliance on what the patient tells you and your own judgment of whether it inherently is true and whether you would accept it from that person? A. That's right.

Q. Just tell me again, if you will, and I think this is the last question: What do you say was your diagnosis? A. My diagnosis was that of personality pattern disturbance.

In the American Psychiatric statistical manual here it has a number attached to it, 000-X40.

He has in his make-up some aspects of the schizoid personality, which would be X42.

And there are some paranoid elements here, which would be—

Q. What's the last part? A. The last of the paranoid elements, the X44.

Q. What would that mean, X44? A. These are the numbers that are attached by the American Psychiatric Association in their effort to classify and differentiate one type from another.

(493)

Q. These are not things that normal people would have? A. No, sir, they are not.

Q. So that he is different from the normal. The only question is a matter of degree; is that correct? A. That is correct.

* * * * *

Mr. Rosen: The Government rests.

(Witness excused.)

Motion for a Directed Verdict of Acquittal

The Court: The Jury may step down.

(Jury excused.)

Mr. Singer: At this point I want to renew each and every motion that I made at the close of the Government's case and that I made originally, and upon all the testimony now before the Court, I say, first, there ought to be a directed judgment of acquittal upon the ground that the Government has failed to establish, first, that the defendant intentionally and

(494)

wilfully violated the law and, second, that I think that there is such a grave issue as to his mental capacity to do the act of registration required of him so that there really is no issue on that for the Jury to determine;

And further upon the ground with respect to the statute of limitations and each and every other argument or reason that I raised at the close of the Government's case.

The Court: Motions are in all respects denied. I think there are fact questions for the Jury.

Mr. Singer: To which I respectfully except.

(496)

The Court: Requests to charge. I would like to rule on them. I have gone over them.

Mr. Singer: There are three others that I dictated this morning.

(497)

Mr. Rosen: Yes, and I have some also.

The Court: Let us go over what you have done, and if you can tell me what you intend, I may be able to tell you whether or not I agree.

Rulings on Requests to Charge

Let us first take the preliminary requests. I assume you have gone over them, Mr. Rosen?

Mr. Rosen: Yes, sir.

The Court: I intend to grant 1 and 2 and I assume there is no question about that.

Any questions about 3 and 4?

Incidentally, you both know, I think you have both tried cases before me, that I charge extemporaneously and when a request is granted it means that I agree with the principle and if a request is denied, it means that I disagree with the principle.

Sometimes it is a closely drawn line and it may sound right except for a phrase, and that is the problem I have with 3 and 4. I intended to deny it at

(498)

the time I read these and didn't yet have evidence as to the mental defect.

I think the question is moot now. I intend to charge, and I think it will eliminate the necessity of going over the reasons for all the denials, but I intended to deny 3, 4 and 5 and 6 because I thought that the Defendant was arguing for a moral basis. If he had a conviction, moral conviction that he had the right to refuse to register, I would not so charge.

I do believe that if he was so thoroughly committed to a moral principle that it affected his mental processes and so could be classified as some defect, then you are entitled to the charge, but only as it it affected his psyche.

In other words, if he could not, no matter from what cause, make a choice to register or not to register, then I would say that he is entitled to the Freeman charge and I intend to say so.

Rulings on Requests to Charge

You can take exception to that ruling, but I will
(499)
not charge that merely because he believed that his moral concepts came from the law of the land that he had the right to refuse to register; that I will reject.

Mr. Singer: To which I except.

The Court: So that will take care of, I believe, 3, 4, 5 and 6.

Mr. Rosen: That will encompass them, yes.

The Court: I intend to say something about knowingly and wilfully means that he is aware in a general way—and I read the Crimmins case and that was by Judge Hand, but I think you only gave me one sentence.

"One is not guilty of a crime unless he is aware of the existence of all the facts which make his act criminal . . ." which seems to imply that he must know the specific Section that he has violated, and so forth. But Judge Hand continues, "... that awareness is all that is meant of the mens rea, the criminal intent necessary as distinct from the specific intent
(500)
required in certain situations."

So I don't think that that quote is applicable here, so as I said I would grant it with a question mark as long as we understand what the case held.

I intend saying that the Government must prove beyond a reasonable doubt that there was an awareness on the part of the Defendant that he was doing something which the law forbids in failing to register. But I won't say that the Government must prove that he knew that there was no provision for obtaining conscientious objector status without registering, and

all the other specific details or facts that the Government is attemping to establish in order to prove wilfullness.

You may have an exception to that. Do you have any objection to 10?

Mr. Singer: You have passed by 8 which—

(501)

The Court: Did I?

Mr. Singer: Yes.

The Court: I intended granting 7 and 8. I have a note here.

Mr. Rosen: That is Freeman.

The Court: I read McDonald, too, and in McDonald the question was whether—that is moot here, too, as to whether the Government must bring in proof once the Defendant makes some showing that there is a mental defect, but the Government did bring in proof and I say it is a contested question. I quoted from McDonald, which was a District of Columbia Court of Appeals case.

"It does not follow, however, that whenever there is any testimony which may be said to constitute some evidence of mental disorder, the Government must present affirmative rebuttal evidence . . . " so I say we did not have the question here, the Government did produce.

(501-A)

Both 7 and 8 are granted.

Any problem with 10 and 11?

Mr. Rosen: No, your Honor.

The Court: They are granted.

12 and 13.

(502)

Mr. Rosen: The normal charge of the Court, I think I have heard it before, about character evidence and the limitations on it.

The Court: Yes. I intend to say that character evidence alone can raise a reasonable doubt but if, on the other hand, they find, based on the whole record, including character evidence, that the Government has proved its case, then they must find him guilty even though they believe he is a man of good character.

Mr. Rosen: The problem is the character evidence. The Defendant, I believe, admitted the words of the indictment. Perhaps there is some reservation as to what he intended to do, but he admitted that he did not register and he did it knowingly. In that situation what value does character evidence have?

The Court: I don't know. There is a defense here. It is a real defense.

Mr. Rosen: Yes, I understand. Can the character—

(503)

The Court: Why not on mental incapacity?

Mr. Rosen: Fine, your Honor. I have no objection. I wanted the limiting instruction.

The Court: I think he is entitled to the charge.

Fourteen I assume there is no objection to.

Mr. Rosen: No.

The Court: Now, Fifteen I deny for the same reason I denied, I believe, it was 3, 4, 5 and 6.

Mr. Singer: To which I except.

The Court: So you have an exception.

Any objection to 16, Mr. Rosen? That is in accordance with what I said I would charge.

Rulings on Requests to Charge

Mr. Rosen: It seems to have already been covered, your Honor.

The Court: Yes, I will grant that.

Seventeen?

Mr. Rosen: I would object to that, your Honor.

(504)

The Court: Seventeen is denied for the same reason that I am denying 15.

Mr. Singer: Exception.

The Court: Eighteen?

Mr. Rosen: That is Freeman.

The Court: That is granted.

Coming to the Government's request.

Mr. Rosen: I have some additional ones, your Honor, which I didn't get a chance to have typed since the Defendant put on his case.

The Court: Suppose you point out any that you think you would like to object to.

Did you go over them, Mr. Singer?

Mr. Singer: I object to No. 4 because of the legal implications in it that I have objected to all along.

The Court: I will grant it. You have an exception to that.

Incidentally, Mr. Rosen, I assume you will give me copies of the regulations. I don't have a copy.

(505)

Mr. Rosen: Yes, sir.

The Court: You will Xerox it and mark off the copies.

Mr. Rosen: I will have them delivered this evening.

The Court: Tomorrow is fine enough.

Mr. Singer: I think No. 6 is unnecessary in view of the fact that we have produced a notice, even though it was misaddressed to another person.

Rulings on Requests to Charge

The Court: I don't think I would even—certainly I wouldn't say the Defendant is deemed to have—at the very outside I would just read the regulations requested, because I think the Government is entitled to a reading of the regulation.

Mr. Singer: I don't think that 6, 7 or 8 are necessary.

The Court: I am going to read the regulation. I think the Government is entitled to it. You have an exception to it, if you wish.

(506)

Mr. Singer: Yes. My objection went to 7 and 8. I have no objection to 9. I certainly have no objection to 11, and as far as 10 is concerned, that I have objected to before and I don't know—

The Court: I grant 10, but I am not going to say that religious or moral beliefs do not excuse the failure to register. All this does is give you the right to say this to the Jury. But I do say that whatever affects mental capacity, be it religious or moral, they are entitled to consider it as it affects his mental capacity.

Mark these as Court exhibits. Mark the Defendant's request as Court Exhibit 2, and the Government's request as Court Exhibit 3.

The Clerk: So marked.

(So marked.)

The Court: Would you care to tell me what the other requests are or would you rather come in a little early tomorrow?

(507)

Mr. Singer: I will be here at ten after 9:00.

The Court: That is not necessary.

Rulings on Requests to Charge

Make it twenty-five minutes after. It shouldn't take too long.

Mr. Singer: I dictated them and corrected them, and I forget now whether I told her to type them out.

The Court: Do you involve principles that have not been discussed here?

Mr. Singer: They only involve principles which have been discussed, and I will tell you what I did so that there be no surprise.

I had in the file the speech that Dean Griswold had made, I think it was in April of this year, concerning the real difficulty between civil disobedience and law. There was one case in which I had selected part of a dissenting opinion of Judge Hughes in the Supreme Court that I was going to point out to you and some of the other language I have picked up out of it, with-

(508)

out giving him credit for having said it, so there were three short requests that I wroteout in longhand.

The Court: Do you think it wil take more than five minutes to discuss?

Mr. Singer: Look, you actually ruled against them, but I do want to submit them as part of my case. I may do this, so we have no problem, it is early and if there is anybody in your chambers by 4:30 it will be delivered to you, perhaps sooner, so there will be no problem.

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(510)

September 10, 1968
Thursday, 9:30 A.M.

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Courts Charge

(511)

The Court: Good morning. I have gone over the three additional requests. Do you have objection to it?

Mr. Rosen: I have just seen them and I do have objection.

The Court: Objection to all three is sustained.

You have an exception, Mr. Singer.

Mr. Singer: Yes, Your Honor.

One last thought. May I ask you to be good enough, and I have not prepared it and I am sure Your Honor has it available, would you give the jury a charge on the effect of opinion testimony?

The Court: Do you mean the expert opinion testimony?

Mr. Singer: Yes.

The Court: I already have it.

Mr. Singer: I neglected to give it to you.

The Court: I outlined my charge. It is one of the things I put in.

Mr. Rosen: Your Honor, I didn't provide the Court with an abstract of 453, the registration section.

(512)

The Court: I will read it.

Are we now ready? We should have summations before the charge.

(The jury entered the courtroom at 9:35 a.m.)

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(568)

The Court: Mr. Foreman and Madam and Gentlemen of the Jury: If you recall the language of your oath, it was to the effect that you would render a true and just verdict.

And I think it is necessary, to accomplish that, that you be instructed both as to the function of the jury with relation (569)
to the other participants and to the law applicable to the case.

This is called an adversary proceeding. The litigants are adversaries: Mr. Singer for the defendant and Mr. Rosen for the Government are the adversaries in this litigation, and they are partial to their cause. They are emotionally involved in their cause. They are protagonists.

The jury and the Court is impartial. We both sit as judges, but there is a clear line of demarcation in our functions. One is the sole judges of the facts and that is the jury. You and you alone will decide the facts, what happened here. And in accordance with the charge of the Court, you will reach the ultimate verdict on the guilt or innocence of this defendant.

I have no opinion one way or the other on the facts here, and I happily leave that to your carful consideration. And just as I now and understand and respect the authority of the jury, with relation to determining the facts, so I expect the jury to understand and respect the authority of the Court with respect to the law. And so I ask you to accept the law, whether or not you like it, whether or not you agree (570)
with it. It is the law of the case and you should accept the law without question.

Every defendant is presumed to be innocent. It is a strong and time-honored presumption in law. It means that the law requires you to conclude that the defendant is innocent and that presumption remains with the defendant throughout the trial and carries into your deliberations in the jury room. And only unless and until it is outweighed by the evidence in the case, the presumption prevails.

But, of course, if the Government proves its case beyond a reasonable doubt, then you shall have found that the presumption of innocence is outweighed. But until that time, the presumption of innocence prevails and the presumption alone is sufficient to acquit the defendant.

You have heard the expression which is the standard of proof in a criminal case, and that is proof beyond a reasonable doubt. Now, I will charge you on the essential elements of the crime charged in this case, and it means that the Government must prove the essential elements of the
(571)
crime beyond a reasonable doubt. It does not mean that the Government must convince you as to the truth of every bit of evidence presented, beyond a reasonable doubt; only that the essential elements of the crime are proved beyond a rasonable doubt.

Now, a reasonable doubt is a fair doubt and it is based on reason and common sense arising from the state of the evidence. A reasonable doubt exists when, after consideration of all the evidence, the jury is not convinced to a moral certainty of the defendant's guilt. But the Government is not required to prove the essential elements of the crime beyond all doubt. It is only beyond a reasonable doubt.

The defendant is not to be convicted on mere suspicion or conjecture. You are not to bring in a verdict of guilty just because you have a feeling that the defendant is guilty. You must put the Government to its proof. In other words, a verdict of not guilty means more than that you believe the defendant is innocent. It also means that the Government has not proved its case, and if the Government has not proved its case, bring in a verdict of not guilty, even though
(572)
you might suspect that the defendant is guilty.

Courts Charge

However, you are not to acquit the defendant on feelings of sympathy or disinclination to perform an unpleasant task.

Now, in this case the defendant has offered evidence of good, general reputation for truth, veracity, honesty and integrity. You should consider such evidence along with the other evidence of the case. If you find on the whole case, including the character evidence, evidence of good reputation, that there is a reasonable doubt, then of course you must find the defendant not guilty.

Now, the character evidence is offered because you may feel it improbable that a man of good reputation or reputation for truth, veracity, honesty, and as a law-abiding citizen, would commit such a crime, and so it may raise a reasonable doubt. However, if on all the evidence, including the evidence of good reputation, you find the Government has proven its case beyond a reasonable doubt, then you must find the defendant guilty even though you believe that
(573)
he is a man of good moral character, since experience has taught us that even citizens of good moral character commit crimes.

Your oath that you took as jurors, in which you swore that you would render a true and just verdict, meant that you swore that you would render a verdict in accordance with the evidence and free of bias, prejudice or sympathy.

That means that you will render a verdict in accordance with the record made in this case, the evidence adduced within the four walls of this courtroom. It means the testimony that you heard from the mouths of witnesses, the exhibits that were marked in evidence, and the stipulation entered into between counsel.

It does not mean that you just deal with the bare facts. It does mean that you use your good common sense and

experience. In dealing with the facts, draw reasonable inferences from established facts.

I might say that there is a difference between a presumption and an inference: a presumption is a conclusion which the law requires you to make, as I have described the pre-
(574)
sumption of innocence. And it remains until outweighed by evidence offered in the case.

An inference, on the other hand, is a conclusion which the jury may make. And it is usually a reasonable or must be a reasonable conclusion drawn from the established facts.

It might be helpful, in determining what is evidence, or in defining what is evidence, to also describe what is not evidence: Statements of counsel in the opening and during the trial and in summation is not evidence. The opening and the summations serve a very useful function. The opening is designed to provide the jury with a guide as to what is to come during the trial, and make it easy to follow. The summation is an analysis of the evidence.

The evidence may be incorrectly quoted. You just reject what you recall is inaccurate.

You may not agree with the analysis of the evidence. The summations urge you to accept the theory of inculpability or exculpability. Of course, on behalf of the Government, inculpability—meaning liability—in this case, criminal
(575)
liability; and exculpability—meaning freedom from guilt —and that is argued by the defendant, of course.

But if an argument sounds logical to you, accept it; if it doesn't, reject it. The important thing is, it is not evidence. What is evidence is in the record.

Matters that were stricken from the record, even though

you heard it, you must so discipline your thinking that you consider this as expunged from the record and as clearly from your minds as it was from the record when the Court said, "Strike it."

There were instances where the Court sustained objection to a question, and you may not speculate on what the answer might have been if the witness were permitted to answer.

Needless to say, anything the Court might have said during the trial is not evidence. I am not under oath and don't give what I said any greater weight than I told you to attribute to what the lawyers said. We are not under oath. We are not subject to cross-examination. It is very easy to make statements. It may be a lot more difficult to sustain
(576)
the position under cross-examination. So though they serve useful functions, they are not part of the record. And by that I mean the statements of counsel and the statements by the Court.

I might say to you at this point that you should not place any significance or any special significance on questions that were asked by the Court. The only reason I, during the trial on occasion, asked a question was because at times there might have been a fuzzy area. I might have felt that it would be helpful to better understand the testimony if I asked the question. But it was not intended at all to give a point of view or to convey to the jury a special meaning or to focus attention on the subject matter. Not at all.

Evidence is a means by which a disputed fact is proved or disproved. The law conveniently divides evidence into two categories. There is direct evidence and there is indirect evidence, or circumstantial evidence. Now, direct evidence is testimony as to a transaction or incident that a
(577)
witness heard or saw. And that is pretty easy to describe;

if you or I were on a street corner and saw a red car pass a stop sign, and either of us testified that we were on the street corner and we saw the car pass the stop sign. That would be direct evidence.

Circumstantial evidence is proof through a chain of inferences drawn from established facts that point to the existence or nonexistence of the fact. For example, if I wanted to prove that the same red automobile passed the same corner, passed the stop sign, when my back was to the stop sign so I couldn't directly see it pass the stop sign, but I were to testify that as I turned to my right I saw the red automobile proceeding at about sixty miles an hour and then a split second later, as I turned to my left, I saw the same automobile passing at about the same speed, the jury might reasonably infer from that testmiony that that red car passed a stop sign.

Now, the law doesn't say that direct evidence is of better quality or that indirect or circumstantial evidence is of better quality. At times direct evidence is of better quality; at times circumstantial evidence is of better quality. The point
(578)
is that on the whole case, both on the direct and indirect, the Government must prove its case beyond a reasonable doubt.

One of the critical issues—I might say the critical issue—in this proceeding is the state of mind of the defendant. Now, it is inconceivable to obtain, or the existence of direct evidence of the state of mind is inconceivable; you can't look into a person's mind and know whether he understands and know what his intent is.

Whether or not the defendant had criminal intent here, as I shall define it, will depend on whether or not the Government has established, beyond a reasonable doubt, and I will say, generally, by circumstantial evidence, that he had such intent.

Courts Charge

So that is an essential element, an ultimate fact that you will have to pass on: that you will have to consider the circumstantial evidence in the case to reach a conclusion on.

One of the duties, maybe the prime duty of the juror, is to pass on the credibility of witnesses. You have seen them before you. And the rules and guides as to assessing credi-
(579)
bility are recognizable because they are the same measures, the same scales you use in your everyday social and business life. Your child or your business associate might tell you a story or relate an incident. You might give it great weight. It might be convincing.

On the other hand, you may question it. You may hear other testimony or another recount of the same story. You may disbelieve it entirely. You may accept the story; you may reject it. You may be convinced beyond a reasonable doubt, and you may not be convinced at all.

Now, use your good, common sense and experience. I can just relate to you some of the obvious and traditional tests offered to jurors in order to assess credibility:

Now, when we talk about credibility, it isn't truthtelling alone, but it also is the position that a witness has in relating the truth. Sometimes the witness is not in a full position to see and hear things and yet the lawyers ask the questions on the stand and they testify to the best of their ability. So credibility means believability, rather than precisely to
(580)
determine truthtelling or the alternative, the untruth.

You have seen the witness on the stand before you and his demeanor is a factor. Did the witness, in answering questions, attempt to evade a question? Did he give you the appearance of answering fully, completely and directly and honestly? In other words, did it have what we call the ring of truth?

Consider the witness' intelligence, his motive for testifying. Does he have a motive for lying; does he have a motive for telling the truth? What is his state of mind in testifying? Consider the relation of the witness to the case and his interest in the outcome of the case.

In this case it is obvious that the defendant is interested in the outcome of the case. It is not to say that someone who is interested necessarily tells untruths or intentional lies about the case or the testimony or in the testimony. It just means that experience has told us that that is a factor to be taken into consideration and that one who is interested in the outcome of the case tells of a transaction or incident
(581)
a little differently than one who is disinterested in the case.

When I come to it, I will point out that I believe, and I think counsel has conceded, the critical issue in this case is the state of mind, the criminal intent, of the defendant.

We had three expert witnesses. We have also had some lay testimony and I don't want you to disrgard that, because the defendant testified as to his state of mind. But we had Dr. Baruch, Dr. Falsey and Dr. Dunkle.

Normally, witnesses may not express an opinion. Witnesses are asked to tell what they saw, what they heard. There are some exceptions to that, too, but generally testimony that includes opinions is not proper.

The one class that constitutes an execption to that general rule is the expert testimony and expert witnesses. An expert is one who, by reason of education, experience, is qualified to express an opinion as to a matter. So we have the doctor who is a general practitioner, is qualified by reason of his background and training to express an opinion. And, of course, the two psychiatrists.

(582)

Now, the mere fact that they call experts is no reason that you should accept their opinion at fact value. Their testimony, too, is to be judged by their background, their training, what you saw before you, how they responded. You give each expert and the opinion he expressed the weight that you believe it is entitled to.

Now, those are the general rules on your function: description of the evidence; presumption of innocence; burden of proof; and how you are to weigh and assess the credibility of witnesses.

I would like to turn to the specifics. The case is entitled, "United States of America against Robert I. Toussie." And, of course, you are to give no weight at all to the indictment. I read it only because it is necessary to know what the Government charges. The defendant has pleaded not guilty. And I know that you will treat both parties as equals, both the United States of America and Robert I. Toussie.

The charge is, and I quote:

"On or about and between the 23rd day of June 1959 and the 3rd day of February 1967, both dates being approximate

(583)

and inclusive, within the Eastern District of New York and elsewhere, the defendant, Robert I. Toussie . . ." I will just hesitate before I read the next phrase, ". . . willfully and knowingly . . ." and then I will continue: ". . . failed and neglected to perform a duty required of him by the Universal Military Training Service Act of 1948, as amended; the proclamation of the President of the United States; and the regulations issued and promulgated pursuant to said Act . . ." and then again, ". . . by knowingly and willfully . . ." the phrase is repeated— ". . . evading

. . ." I won't say repeating, because actually the posed words are reversed, but the thought is repeated.

First the Government says, "willfully and knowingly" and then "knowingly and willfully evading and refusing registration by the Selective Service System."

Now, what is criminal conduct is defined by the Congress. And the Congress, first in 1948, defined what an offense would be, what a crime would be with relation to the failure to register under the Selective Service System. And it said
(584)
it in this language, and I am reading a part of Section 462 (a) of Title 50. It says:

"Any member of the Selective Service System, or any other person—a person charged as herein provided—with the duty of carrying out any of the provisions of this Title . . ." and it refers to Sections 41 to 54 inclusive, and I say that only because I will soon read Section 453, which is pertinent to the prosecution here. ". . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . ."

I call your attention to the fact that "knowingly" is again used.

Then it goes on in the disjunctive, ". . . or directions made pursuant thereto, or who otherwise evades or refuses registration."

Now, that Section, as I say, referred back, in part, to Section 453, and that is entitled, "Registration."

"Except . . ." and this was also part of the same Act, the Universal Military Training Act, and this is just listed conveniently as Section 453 of Title 50:
(585)

"Except as otherwise provided in this Title, . . ." and

the exceptions are not pertinent in this proceeding, ". . . it shall be the duty of every male citizen of the United States and every other male person now or hereafter in the United States who, on the day or days fixed for the place of subsequent registration, who is between the ages of eighteen and twenty-six, is to present himself for and submit to registration at such time or times and place or places and in such manner as shall be determined by proclamation of the President, and by rules and regulations prescribed hereunder."

And pursuant to that Section, the President of the United States in 1948 and subsequent to the date the Act was signed, made the following proclamation, among others. And I will only read the pertinent part:

"Persons who were born on or before September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter."

Now, there were many regulations promulgated and at (586)
this point, because I am reading the statutory law, I will also read some of the regulations, as a matter of fact, two of them that are pertinent to this case:

1611.1, entitled "Persons Required to Register": It says, "Except as otherwise provided by the regulations in this part, it shall be the duty of every male citizen of the United States and every other male person who is in or hereafter enters the United States who shall have attained the eighteenth anniversary of the day of his birth, and who shall have not attained the twenty-sixth anniversary of the day of his birth, on the day or any of the days fixed for registration by Presidential Proclamation, to present himself for and submit to registration under the provisions of

Section 3 of the Military Selective Service Act of 1948, at such time or times and place or places and in such manners as required by proclamation of the President and the regulations in this part.

"B. Every male person required to register shall present himself for and submit to registration before a duly designated registration official or the Local Board having juris-
(587)
diction in the area in which he has his permanent home, or in which he may happen to be on the day or on any of the days fixed for his registration."

And Section 1617.1 says, in part: "The failure of any person to have his registration certificate SSS Form 2 in his personal possession shall be prima facie evidence of his failure to register."

Now, the Government must prove two essential elements of the crime. One, is the proscribed conduct, the prohibited act. It must prove that the defendant failed or neglected to perform a duty required of him under Section 453, in that he failed to register upon attaining the age of eighteen years and five days; and, further, upon failing to register at any time until he reached his twenty-sixth birthday.

And the date fixed in the indictment is the 3rd day of February 1967. That is the proscribed conduct.

Now, as I understand the defendant's position, there is little question but that there was a failure to register. The Government, however, must prove that failure beyond a
(588)
reasonable doubt.

I said what I said as to the first element of the crime charged because I wanted to emphasize what I believe is the critical issue in this proceeding. And that is that the

failure to register or the refusal to register—I would rather use the language of the indictment that says, "Failed and neglected and refuses . . ." because it is in the last sentence, ". . . was knowing and willful."

Now, to knowingly fail to act or to knowingly act means that the act or the failure was done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word, "knowingly" was to insure that no one would be convicted because of an omission or failure to act or in acting because of mistake or accident or other innocent reason.

Specific intent must be proved by the Government in this case, and that is part of the word "knowingly," and it is used for the reason I indicated.

(589)

Now, an omission or failure to act or the performance of an act is willful if done voluntarily and intentionally and with the specific intent to do or to fail to do something which the law requires to be done.

Now, we are talking about state of mind. The Government must prove that the act was done knowingly and willfully.

And we are talking about intention. There is some evidence in this case that, through the years, the defendant acquired certain moral principles and that is one of the reasons he didn't register. Well, I will charge you later, when we talk about mental capacity and the act, and the Government must prove, that the act was a voluntary act, one of choice; and if while he retained that choice he nevertheless chose to disregard the law and abide by what he believed to be a higher moral principle, his reason, his motive for failing to register under those circumstances, is not an answer to this charge. Good motive alone is never a defense where the act done or admitted is a crime. So the motive of

the accused immaterial, except insofar as evidence of mo-
(590)
tive may aid in the determination of state of mind or intent.

Now, the Government must prove more in this case than that the defendant had the requisite criminal intent. I might say at this point that every crime consists of two parts: one, the proscribed conduct; and the other, the criminal intent. But where mental capacity is put in issue, the Government must prove that the defendant had the mental capacity to formulate the criminal intent. If he couldn't do it, if he was incapable because of some mental defect, then he obviously couldn't possibly have the criminal intent. Without the capacity, you cannot have the intent.

When we talk about mental capacity, we talk about when criminal responsibility should be imposed. Criminal responsibility is not imposed unless the prohibited act was rational, was voluntary. And by "voluntary" we mean one of real choice, not theoretical choice. The conduct is not criminal unless the defendant was aware of his conduct and appreciated the wrongfulness of his conduct and also was able to conform his conduct to the requirements of law.
(591)
This all implies the capability, the capacity of the defendant to act voluntarily.

In this case there is evidence that the defendant suffered from some psychiatric disorder. It was variously described as a neurosis, neurotic reaction, and as I recall, Dr. Baruch called it schizeophrenia, which he said was a mild form of schizophrenia. These are all terms and they are helpful. But you must understand that the defendant doesn't have to be classified into some neat category in medicine in order to avail himself of the defense.

And, of course, we keep calling it a defense and I notice

the Governnient called it a defense, but I want you to know that the Government must prove the negative beyond a reasonable doubt.

Now, I might have to explain "negative." The Government must prove, in a positive way, prove beyond a reasonable doubt, that this defendant did have mental capacity. So even though the Government has called it a defense that is raised by the defendant, the Government must prove, as part of proving criminal intent, that the defendant had the mental capacity and must prove it beyond a reasonable doubt.

The Government must prove beyond a reasonable doubt that the defendant had the mental capacity to commit the crime charged. If the Government fails in its proof, then criminal responsibility for the alleged unlawful act cannot be imposed and you must find the defendant not guilty.

The defendant, and this is the test, the defendant is not criminally responsible if, at the time he was required to register, as a result of mental disease or defect, he lacked substantial capacity either—and it is in the disjunctive—if he lacked the mental capacity either, one, to appreciate the wrongfulness of his conduct; or, two, to conform his conduct to the requirements of law. So that even if he appreciated the wrongfulness of his conduct, if he didn't have the mental capacity to conform his conduct to the requirements of the law, then you must find the defendant not guilty.

Now, we are talking in terms of the defendant's incapacity, but when I said the Government must prove in the negative, I mean the Government must prove the opposite—the Government must prove that he had the mental capacity.

The defendant here is saying there is incapacity, mental incapacity. And that is what I meant by the negative; proof in the reverse. The Government must prove, really, the

positive: that the defendant had the mental capacity to commit the crime.

Now, the finding of a psychiatric disorder does not in and of itself relieve the defendant of criminal responsibility. You must also decide whether such psychiatric disorder affected the defendant's capacity to commit the crime charged. You might very well find that he suffered from some neurosis or even, as Dr. Baruch said, a mild form of schizophrenia, but if it is unrelated to his capacity to commit the crime, then the defendant cannot avail himself of the defense that is based upon such a disorder. The defendant is responsible for his unlawful conduct if you find that though he suffered from a psychiatric disorder, he never-
(594)
theless retained substantial capacity to commit the crime charged.

He is not criminally responsible if you find that he would not have committed the crime but for the mental disease or defect.

Again, I remind you, because of the various ways in which mental capacity is phrased, that the Government has the burden of proving the defendant's mental capacity to commit the crime charged beyond a reasonable doubt. If you have a reasonable doubt as to his mental capacity, you must find the defendant not guilty.

On the other hand, if you find that the Government has proved mental capacity beyond a reasonable doubt, and proved criminal intent and proved the prohibited act, all beyond a reasonable doubt, then you must find the defendant guilty.

I will soon excuse you from the courtroom, momentarily, first, and then I will call you back. But then I will excuse you for the second time to deliberate on the matter before you.

I would suggest that since the hour would be near to 12:30 or twenty to one, that you take your lunch and start (595)
your deliberations after lunch. But you can decide that.

However, during your deliberations you might have occasion to communicate with the Court. Do that through your Foreman. You will be provided with pencil and paper.

Now, a verdict in this case means a unanimous verdict, and a unanimous verdict, in turn, means that each juror must be convinced, if it is a verdict of guilty, beyond a reasonable doubt. Twelve individual opinions as to the defendant's guilt. Or you can find the verdict to mean twelve individual opinions that the Government has failed to prove its case beyond a reasonable doubt.

When we talk about a unanimous verdict, a juror might conceivably get the impression that he should go along with the others. That, obviously, is wrong. Unanimity for the sake of unanimity is wrong.

On the other hand, a juror might get the impression from what I said that once you arrive at a determination one way or the other that you should not move from that. That, too, would be wrong. The fact is, you must arrive at your con- (596)
clusion after analysis of the evidence in the case and after discussion with your fellow jurors. You have an obligation and a duty to discuss the case with a view to arriving at a unanimous verdict without, however, ever giving up your determination, your decision of this case for the sake of unanimity. Never do that.

Now, in your communications with the Court, never disclose how the voting is on the guilt or innocence of the defendant. I am only interested in the voting when it is unanimous, and all you need say is, "We have arrived at a

verdict." Don't tell me that it is eleven to one, ten to two, six to six, eight to four. I am not interested. That is the private business of the jury.

However, when you have arrived at a verdict, just say, "We have arrived at a verdict." And you will be called into the courtroom and I will ask the Foreman to stand and the Clerk will ask the question, "In the case of the United States of America against Robert I. Toussie, how do you find the defendant, guilty or not guilty?" And then the Foreman will give the verdict.

(597)

I am going to excuse you for just a few moments. I ask you not to start your deliberations on the matter before you. The jury is excused for a few minutes.

[The jury left the courtroom at 12:25 P.M.]

The Court: First, the Government. Let's see if they have anything.

Mr. Rosen: No exceptions, Your Honor.

The Court: No exceptions on anything?

Mr. Rosen: No, sir.

The Court: Mr. Singer?

Mr. Singer: Now let me do this quite out of the ordinary:

First, Your Honor, I want to say that I am entirely satisfied with Your Honor's charge on intent and Your Honor's charge on mental capacity, so that I want to simply point out as to that, to which I object.

The Court: I may say, parenthetically, here, that if you missed any of the previous exceptions that you have taken to the Court's rulings, they are in no way waived, but you may repeat any of them that you wish. But even if you

(598)

overlooked any—

Mr. Singer: I don't intend to except, but I want to except to so much of Your Honor's charge wherein Your Honor deprived the jury of the right to pass upon the issue that I raised originally. That is, whether, if he really had a conscientious belief and he was not required to register.

That was extending the conscientious objector rule to registration.

Second, to so much of Your Honor's charge wherein Your Honor charged the jury that the failure to register at any time up to the date of the indictment, February 3, 1967, was something which the jury could consider.

The Court: Let's say the date recited in the indictment. The date recited in the indictment is May 4.

Mr. Singer: I am sorry, Your Honor, the indictment did say up to the date of February 3rd. Maybe I am wrong. And I am objecting to any date, because the Government had failed to elect, and Your Honor had refused to compel him to elect.

(599)

I also respectfully except to so much of Your Honor's charge, or the theory on which the case is being submitted to the jury, that is, that it was a continuing offense.

The Court: Thank you.

Mr. Rosen: May I just point out one thing? I believe you said the 19th—on or before September 19th. I don't know if it had that much relevance.

The Court: What is September 19th?

Mr. Rosen: In the Presidential Proclamation it says, I think, it is on or after. I am not sure.

The Court: It says on or after.

Mr. Rosen: I thought you charged the jury on or before,

and that would mean Mr. Toussie wouldn't have to register. It should read, "after."

The Court: Subdivision J; that is Subdivision J. Do you think you can find it?

Mr. Singer: While she is looking for that, while this is unimportant, I think you just misspoke a word and said, "any of the defendants," and you meant "jurors." You just misspoke a word. But then you corrected it right after. (600)
It is unimportant because it became quite clear as to what you were saying.

(The record was read.)

The Court: That is wrong. I will correct it.
Get the jury.

(The jury returned to the courtroom at 12:35 P.M.)

The Court: It has been called to my attention that I misread a portion of the Presidential Proclamation with reference to registration. I said it was made by the President soon after the Act was signed on June 24, 1948. This is the correct reading:

> "Persons who were born on or after . . ."

I understand I said "before" in the other reading. It should read:

> "Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth or within five days thereafter."

Verdict

At this point, I am going to excuse the alternates, and you are excused with the thanks of the Court. As you under-
(601)
stand, only twelve jurors may deliberate on this matter. So you are excused.

(The alternate jurors left the courtroom.)

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(602)

(The jury left the courtroom at 12:45 P.M.)

(603)

The Court: We have a verdict.

Please bring the jury in.

The jury entered the courtroom at 2:50 P.M.)

The Court: Mr. Foreman, would you please rise and answer the question put to you by the Clerk?

The Clerk: Mr. Foreman, Madam, and gentlemen of the jury: Have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find the defendant, Robert I. Toussie, guilty as charged or not guilty as chcarged?

The Foreman: We find the defendant guilty as charged.
(604)

The Clerk: And so say you all?

(The jurors nodded their heads.)

Mr. Singer: Will you please poll the jury.

The jury was polled and each juror individually answered in the affirmative.

Verdict

The Clerk: And so say you all?

[The jurors nodded their heads.]

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(606)

Mr. Singer: Would Your Honor permit me at this time to reserve all motions to the day of sentence?

The Court: The time to make all motions is extended to the date of sentencing.

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Motion to Set Aside Verdict and for a New Trial

(1)

United States Courthouse
Brooklyn, New York
November 29, 1968
10:00 o'clock A.M.

• • • • •

(2)

Mr. Rosen: Government is ready, your Honor.

Mr. Singer: May I at this time move to set aside the verdict upon the ground that I urged in my motion before trial to dismiss the indictment upon the ground that the Statute of Limitations had run, and upon the ground that the Selective Service Act provides no remedy for persons who stand in the position that this Defendant took, that is, a person whose conscientious beliefs were that he could not register, as a matter of good conscience, and upon the grounds that were raised in the pretrial motions.

I further move to set aside the verdict and move for a new trial upon the grounds that I urged at the time when I made the motion for judgment of acquittal at the close of the Government's case and at the close of the entire case, and upon all the objections and exceptions taken at the trial, and the failure of the Court to charge as requested.

(3)

The Court: Motion denied.

Mr. Singer: To which I respectfully except.

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Notice of Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Crim. No. 67 CR 183

UNITED STATES OF AMERICA

—against—

ROBERT I. TOUSSIE,

Defendant

NOTICE is hereby given that Robert I. Toussie, the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment of conviction entered in this action on November 29, 1968.

Dated: Brooklyn, New York
November 29, 1968

ROBERT I. TOUSSIE
Defendant in Person

HENRY G. SINGER
Attorney for Defendant
16 Court Street
Brooklyn, New York 11201

Judgment and Commitment Appealed From

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

On this 29th day of November, 1968 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty of the offense of violating T-50, U.S. Code, Sec. 462(a) that on or about and between June 29, 1959 and Feb. 3, 1967, both dates being approximate and inclusive, the defendant, wilfully and knowingly failed to perform a duty required of him by the Universal Military Training and Service Act of 1948, as amended, by knowingly and wilfully evading and refusing registration by the Selective Service System as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for study and report pursuant to Section 4208(B) of Title 18, U.S. Code. Geographical Bail limits restricted to New York State. Special visit permitted to the State of Oklahoma up to and including but not to exceed December 13, 1968. Sentence stayed pending diligent prosecution of Appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JACOB MISHLER
United States District Judge

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 518—September Term, 1968.

(Argued April 17, 1969 Decided May 14, 1969.)

Docket No. 33106

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT I. TOUSSIE,

Appellant.

Before:

WATERMAN, SMITH and FEINBERG,

Circuit Judges.

Appeal from conviction in the United States District Court for the Eastern District of New York, after a jury trial before Jacob Mishler, *J.*, for failing to register for selective service in violation of 50 U.S.C. App. § 462(a). Affirmed.

HENRY G. SINGER, Brooklyn, N. Y. (Jacob W. Heller, on the brief), *for Appellant.*

JEROME C. DITORE, Assistant United States Attorney (Vincent T. McCarthy, United States Attorney for the Eastern District of New York, on the brief), *for Appellee.*

Opinion of United States Court of Appeals

FEINBERG, *Circuit Judge*:

After a jury trial before Jacob Mishler, *J.*, in the United States District Court for the Eastern District of New York, appellant Robert I. Toussie was convicted of having failed to register for the draft in violation of 50 U.S.C. App. § 462(a). Appellant was sentenced under 18 U.S.C. § 4208 (b), which commits him to the custody of the Attorney General for study and report, but sentence was stayed and appellant released on his own recognizance pending appeal. Although appellant raises a number of substantial questions, we conclude that his conviction should be affirmed.

Appellant never registered for selective service from June 23, 1959, when he became 18, to the time of his arrest and indictment in 1967. He claims that his sincerely held conscientious beliefs against war prevented him from doing so, that his prosecution was barred by the general five-year statute of limitations, 18 U.S.C. § 3282, that his conviction violated his fifth amendment right against self-incrimination, that there was insufficient proof of his mental capacity, and that there were errors in the charge of the trial judge. We turn first to the claim based on the statute of limitations.

I.

The command of 18 U.S.C. § 3282 is that:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Appellant's claim is that his offense, if any, was committed in June 1959 on his 18th birthday or a few days thereafter

so that his indictment in 1967, almost eight years later, was barred by the statute. The Government replies that the offense of failing to register is a continuing one; hence the prosecution was timely. This position is based upon a regulation issued by the President, 32 C.F.R. § 1611.7(c), which states:

> The duty of every person subject to registration to present himself for and submit to registration *shall continue at all times,* and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be. [Emphasis added.]

See also 32 C.F.R. § 1642.2. Appellant rejoins that the regulation cannot change a single statutory offense to a continuing crime. The issue was raised in the trial court before John F. Dooling, Jr., *J.*, on a motion to dismiss the indictment, and Judge Dooling rejected appellant's contention. 280 F. Supp. 473 (E.D.N.Y. 1967).

Surprisingly, the issue has not been litigated frequently, although the few decisions favor the Government. In *Fogel* v. *United States,* 162 F. 2d 54 (5th Cir.), cert. denied, 332 U. S. 791 (1947), the continuing crime theory was applied to failure to register for the draft. Although the decision has been criticized,[1] the only other court of appeals that has considered the question has reached the same result, expressly citing *Fogel* with approval. *McGregor* v. *United*

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[1] See Note, The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution, 102 U. Pa. L. Rev. 630, 644-45 (1954); Stan. Intra. L. Rev. 39 (1948). See also Model Penal Code §§ 107(4), 108(1)(c), Comments (Tent. Draft No. 5, 1956).

States, 206 F. 2d 583 (6th Cir. 1953); cf. *Gara* v. *United States,* 178 F. 2d 38, 40 (6th Cir. 1949), aff'd on another point by an equally divided court, 340 U. S. 857 (1950). In addition, this court used a continuing duty theory in affirming a conviction for the analogous crime of failing to advise the local draft board of a change of address, *United States* v. *Guertler,* 147 F. 2d 796 (2d Cir. 1945). The only apparent contrary authority is a district court decision in *United States* v. *Salberg,* 287 F. 208 (N. D. Ohio 1923), involving World War I registration, but it is unclear whether any regulation then clearly made the duty to register a continuing one.

The tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term. On the other hand, we are faced with a regulation that clearly establishes a continuing duty and that has long been construed as creating a continuing offense. Appellant argues that the regulation is unconstitutional or unauthorized, but we do not think that is so. The statutory duty to register is set forth in 50 U.S.C. App. § 453, as follows:

> Except as otherwise provided in this title . . ., it shall be the duty of every male citizen of the United States . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

The regulation here involved was promulgated by the President through an Executive Order and does deal with the days and times for registration. Moreover, the President

is authorized by 50 U.S.C. App. § 460 to prescribe rules and regulations necessary for the operation of the selective service system. We could not fairly say that the regulation is outside the congressional grant of power unless it were construed to create an unending duty because of the phrase "shall continue at all times." That is the meaning appellant ascribes to it, envisioning a prosecution at age 70 for failure to register 52 years before at age 18. This contention is understandable in view of the simultaneous indictment of appellant's brother Samuel, who was then almost 33.[2] Were that reading of the regulation correct, we agree that the result would be unfair and absurd. But Judge Dooling found that construction unwarranted and construed the continuing duty to end at age 26, a ruling with which we agree. The power to compel registration flows from the statute which, by its terms, applies only to males between the ages of 18 and 26; the regulation can do no more and should not be construed to attempt to do so. *Cf.* 32 C.F.R. § 1642.12.

Appellant also argues that the general five-year statute of limitations must apply "Except as otherwise expressly provided by law," and that Congress has made no such plain exception for the crime charged here. It might be enough to point out in response that the five-year statute is being applied; the issue is when it starts to run. But, more fundamentally, even if construed as an extension or a tolling of the statute of limitations to five years after

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[2] Judge Dooling held that the 5-year statute of limitations in 18 U.S.C. § 3282 had run as to Samuel and dismissed the indictment. But see *McGregor* v. *United States*, 206 F. 2d 583 (6th Cir. 1953) (indictment at age 30 when predecessor to 18 U.S.C. § 3282 was a 3-year statute of limitations); cf. *Fogel* v. *United States*, 162 F. 2d 54 (5th Cir.), cert. denied, 332 U. S. 791 (1947), motion for new trial denied, 167 F. 2d 763 (5th Cir.), rev'd, 335 U. S. 865 (1948) (*per curiam*).

age 26, the continuing duty regulation is an express provision of "law."

We are aware of other problems lurking in the background, some of which appellant has called to our attention. For example, is each day of failure to register a separate offense, for which a prosecution can be brought? Cf. *Gara* v. *United States, supra.* Can the knowing and wilful failure to register when the duty first attaches be legally cured by a subsequent tardy registration? The Government, in its brief, flatly answered the first question no; an affirmative answer to the second would be questionable at best. However, since the indictment here charged only one offense—wilful failure to register over a lengthy period of time—and appellant never did register, neither issue is squarely raised, except in connection with the fifth amendment argument discussed below. Moreover, are there other continuing duties under the selective service system that are not cut off at age 26, and, if so, when, if ever, does the statute of limitations run as to them? It may be that application of the statute of limitations to this area deserves particularized congressional attention, with a statute, rather than regulations, stating the applicable limitation periods. But the only question before us on this phase of the case is whether the five-year statute of limitations had run on appellant's offense of failing to register up to age 26. We conclude that on this record that defense was properly rejected by Judge Dooling.

II.

Appellant's second claim is that if the statute of limitations did not bar prosecution more than five years after his initial failure to register then the fifth amendment does. The claim is a novel one in the draft registration area, although in *United States* v. *Olson,* 253 F. 233 (W. D.

Wash. 1917), a different type of self-incrimination claim involving World War I registration was made and rejected. See generally Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 125-58. However, appellant draws heavily on recent decisions of the Supreme Court, reversing convictions for failure to comply with other registration statutes on the ground that compliance would have required the registrant to incriminate himself. See *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965) (failure to register as member of the Communist Party); *Marchetti* v. *United States*, 390 U. S. 39 (1968) (failure to register as gambler); *Grosso* v. *United States*, 390 U. S. 62 (1968) (failure to pay gambling tax); *Haynes* v. *United States*, 390 U. S. 85 (1968) (possession of unregistered firearm). Appellant's attack is focused solely on the continuing duty regulation. That regulation, it is argued, could not legally be applied to appellant because compliance would have compelled him to disclose his birth date and age, thereby admitting criminal culpability for his prior failure to register. Cf. *United States* v. *Rosenson*, 291 F. Supp. 874 (E. D. La. 1968).

This argument immediately brings to mind several considerations, some suggested by the Government. Thus, there is no claim that, as in the cited cases, the initial requirement of registration for selective service runs afoul of the self-incrimination privilege. The government interest being furthered—the raising of an army—is most significant, and self-registration is probably necessary to enforce the statutory scheme. The purpose of registration is not to detect and prosecute a certain type of criminal, e.g., gamblers, but to select those available and qualified for military service. While it is arguable that the continuing duty regulation is directed at a "selective group inherently suspect of criminal activities," *Albertson* v.

Subversive Activities Control Board, supra, 382 U. S. at 79, many initial failures to register may be due to such innocent reasons as illness, ignorance, or inability to get to a local board. Moreover, the regulations indicate that the aim is get qualified registrants—even delinquent ones—into the armed forces rather than into jail.[3] Cf. *United States* v. *Minor,* 398 F. 2d 511 (2d Cir. 1968). In addition, it may be possible for a young man to register late without giving the incriminatory information, cf. *United States* v. *Sullivan,* 274 U. S. 259 (1927), but it must be conceded that doing so might well focus unwanted attention on him. Moreover, since appellant chose not to register at all, the Government contends that he has no valid claim. Finally, this might well be the type of case in which the privilege would be sufficiently protected by barring any possibly incriminating information in any subsequent prosecution; Judge Dooling in substance accepted this reasoning, but that was before the Supreme Court decisions cited above.

Although some of these considerations are substantial, we conclude that there is a more fundamental reason for rejecting appellant's fifth amendment analysis. A registration statute may create the dilemma whether to incriminate oneself or risk punishment for failure to do so: e.g., whether to register as a communist or a gambler or owner of a firearm or risk prosecution for failing to register, as in *Albertson, Marchetti* or *Haynes.*[4] In these situations, the Supreme Court has applied the privilege to eliminate that

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[3] The regulations provide for referral to a United States Attorney only after the local board fails to convince the registrant to perform his duites. See, e.g., 32 C.F.R. § 1613.16. In other situations a board would presumably rely on the delinquency regulations. See 32 C.F.R. §§ 1642.1-.46. But cf. *Kaohelaulii* v. *United States,* 389 F. 2d 495 (9th Cir. 1968).

[4] Mr. Justice Goldberg referred to the possibility of giving perjured answers, thus converting the "dilemma" into a "trilemma." See *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964).

problem. But that is not the case here. Assuming for discussion only that Toussie might have incriminated himself by registering, let us say, four years late, we think that he did not risk prosecution by failing to do so, at least not in the sense relevant here. That is, his inaction did not give rise to the threat of punishment beyond that he had already risked. The Government has conceded that only one offense is committed by failing to register between the ages of 18 and 26, and its actions have been consistent with its words. Appellant was indicted for and convicted of only one offense—failing to register on his 18th birthday or at any time. By doing nothing—as indeed was his course—Toussie was not being put to a cruel choice that the privilege is designed to avoid. It is true that because of appellant's inaction from age 18 to age 26, the statute of limitations did not start to run, so that the risk of prosecution was in that sense at least not being diminished. That element of the risk, however, attaches to merely continuing to exist at all, having once committed the crime. Certainly, it would be preferable for one in Toussie's position to shorten a limitation period or to insure the beginning of its lapse. But we do not regard the inability to do so without danger of detection as violating his privilege against self-incrimination. Similarly, leaving the jurisdiction may be a ground for tolling of the statute of limitations, *cf.* 18 U.S.C. § 3290, but we would not regard that as an improper infringement on the right to travel. While the concept of compulsion as used in the fifth amendment context has been liberally construed by the Supreme Court,[5] the unpleasant consequence here of doing nothing is not sufficient to fit properly within that term, cf. Friendly, The Fifth Amendment Tomorrow: The Case for

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[5] See, e.g., *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Griffin* v. *California*, 380 U. S. 609 (1965).

Constitutional Change, 37 U. Cin. L. Rev. 671, 675 n. 25, 700 (1968), particularly in view of the importance of the government interest involved. In short, we hold that the fifth amendment did not bar prosecution here.

III.

Appellant's remaining arguments do not require extensive comment. The claim is made that failure to register for reasons of conscience is protected by the first amendment. However, appellant apparently recognizes that the authorities are against him, asking for "a new look by the Federal Courts." Certainly, various courts of appeals have rejected the contention. See, e.g., *United States* v. *Kime*, 188 F. 2d 677 (7th Cir.), cert. denied, 342 U. S. 823 (1951); *Michener* v. *United States*, 184 F. 2d 712 (10th Cir. 1950); *Richter* v. *United States*, 181 F. 2d 591 (9th Cir.), cert. denied, 340 U. S. 892 (1950); *Gara* v. *United States, supra.* And in *United States* v. *Nugent*, 346 U. S. 1 (1953), the Supreme Court emphasized the constitutionality of the statutory treatment afforded conscientious objectors, which required registration, then investigation of the sincerity of alleged religious beliefs and, finally, assignment to non-military alternative service. The Government's ability to carry out this statutory scheme for conscientious objectors clearly depends in large measure on identification of those holding such beliefs. It is true that in theory the sincerity of one who claims that his conscientious beliefs prevented him even from registering could be tested by the trier of fact in a criminal trial, the procedure appellant sought here, but the present procedures of administrative decision and judicial review do not constitute an infringement of the first amendment. While a proper test of a civilized society is the solicitude with which it treats its principled dissenters, under present

doctrine requiring them to register for eventual assignment to non-military alternative service is constitutional.

Appellant's final claims are insubstantial. There was ample evidence before the jury to warrant a finding that he had the requisite mental capacity, despite a history of emotional disturbance. Moreover, the trial court properly charged the jury on this issue under the test of *United States* v. *Freeman*, 357 F. 2d 606 (2d Cir. 1966), and committed no error in its charge or rulings on defendant's requests to charge.

Judgment affirmed.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May, one thousand nine hundred and sixty-nine.

Present: HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Robert I. Toussie,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Order of the Supreme Court Granting Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 441

ROBERT I. TOUSSIE,

Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed October 20, 1969.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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AUG 7 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT I. TOUSSIE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MURRAY I. GURFEIN,
Attorney for Petitioner,
655 Madison Avenue,
New York, N. Y. 10021.

JACOB W. HELLER,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Reasons for Granting the Writ	5
Argument:	
As to question 1:	
The Fifth Amendment precludes application of the continuing duty theory to the act of registration	8
As to questions 2 and 3	16
The offense charged was time-barred by the five year limitation period prescribed by 18 U.S.C. § 3282; any other construction is constitutionally invalid as an executive usurpation of legislative power	16
As to question 4:	
Petitioner was entitled under the First Amendment to have the jury pass on the sincerity of his conscientious beliefs which prevented him from registering	24
Conclusion	26

INDEX TO APPENDIX

Appendix A—Opinion of United States Court of Appeals	A1
Appendix B—Memorandum and Order of District Court	A12

PAGE

Appendix C—Judgment of United States Court of Appeals A22

Appendix D—Order of United States Court of Appeals Denying Petition for Rehearing A23

Appendix E—Order Extending Time to File Petition for Writ of Certiorari A24

Appendix F—Constitutional Provisions, Statutes and Regulations A25

CASES CITED

A.L.A. Schechter Poultry Corp. v. U. S., 295 U. S. 495 [1935] 22

Albertson v. Subversive Activities Control Board, 382 U. S. 70 [1965] 9, 11, 12, 13

Breen v. Selective Service Local Board No. 16 5

Cannon v. U. S., 181 F. 2d 354 [9th Cir. 1950] 13

Clark v. Gabriel, 393 U. S. 256 (1968) 8

Fogel v. U. S., 162 F. 2d 54 [5th Cir.], cert. denied 332 U. S. 791 [1947] 7, 20, 23

Gara v. U. S., 178 F. 2d 38 [6th Cir. 1949], affd. 340 U. S. 857 [1950] 7, 23

Girouard v. U. S., 328 U. S. 61 [1946] 8, 26

Grosso v. U. S., 390 U. S. 62 (1968) 2, 4, 5, 9, 10, 11

Grunewald v. U. S., 353 U. S. 391 [1957] 13

Gutknect v. U. S. 6

Haynes v. U. S., 390 U. S. 85 (1968)..2, 4, 5, 9, 10, 11, 13, 15

Kaohelaulii v. U. S., 389 F. 2d 495 [9th Cir. 1968] .. 14

Leary v. U. S., 395 U. S. 6, 23 L. ed. 2d 57 (1969) ...2, 5, 9, 12, 16

PAGE

Marchetti v. U. S., 390 U. S. 39 (1968) 2, 4, 5, 9, 10, 11, 14, 15, 16
McGregor v. U. S., 206 F. 2d 583 [4th Cir., 1953] ... 7, 23
Michener v. U. S., 184 F. 2d 712 [10th Cir. 1950] 13
Panama Refining Co. v. Ryan, 293 U. S. 388 [1935] .. 22
People v. Hines, 284 N. Y. 93 [1940] 18
Richter v. U. S., 181 F. 2d 591 [9th Cir. 1950] 13
Russell v. U. S., 306 F. 2d 402 (9th Cir. 1962) 13
U. S. v. Barber, 219 U. S., 72 [1911] 18
U. S. v. Guertler, 147 F. 2d 796 (2d Cir. 1945) 23
U. S. v. Henderson, 180 F. 2d 711 [7th Cir. 1950] .. 13
U. S. v. Macintosh, 283 U. S. 605 (1931) 25, 26
U. S. v. Nugent, 346 U. S. 1 (1953) 8, 25
U. S. v. Oppenheimer, 242 U. S. 85 [1916] 18
U. S. v. Rosenson, 291 F. Supp. 874 (E. D. La. 1968).. 9
U. S. v. Schwimmer, 279 U. S. 644 (1929) 25
U. S. v. Sisson, 297 F. Supp. 902 (D. C. Mass., 1969, Wyzanski, J.) 6
United States v. Sullivan, 274 U. S. 259 (1927) 13
U. S. v. Warren, 199 Fed. 753 [5th Cir. 1912] 21

STATUTES CITED

18 U.S.C. § 3282 ..... 2, 4, 6, 7, 16, 21
18 U.S.C. § 3284 21
18 U.S.C. § 4208(b) 3
28 U.S.C. § 1254(1) 2
18 U.S.C. § 581-3 20

PAGE

Universal Military Training and Service Act (50 U.S.C. App. § 451 et seq.) 2, 3, 8
§ 453 ..... 16, 18, 22
§ 454 ..... 18, 21, 23
§ 462 ..... 11, 16

Act of April 30, 1790, Ch. 9 § 32, 1 Stat. 118 20

The Treason Act, 1965 [7 and 8, 82 Will. IIIc. 3] 20

9 Halsbury Statutes of England 20

OTHER AUTHORITIES

Selective Service Regulation (32 C.F.R. § 1611.7[c]) 2, 8, 17
§ 1613.11(a) 10
§ 1613.12(c) 10
§ 1613.16 11

Presidential Proclamations
No. 2799 ..... 16, 19
No. 2942 ..... 16, 19

102 Univ. of Pa. L. Rev. 630 [1954] 20

Whitmore, Colonial Laws of Mass. 163 [1889] 20

Charter and Laws of the Province of Pa. 1682-1700 (George, Neod and McComant [1879]) 20

Howe, Readings in American Legal History 19 [1949] 20

Radin, Anglo-American Legal History § 79 [1936] .. 20

ALI Model Penal Code, Tentative Draft No. 5, § 1.07(4) 20

Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT I. TOUSSIE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 14, 1969.

Opinion Below

The opinion of the Court of Appeals is printed in the Appendix to this petition (A1-11).* The opinion of the District Court for the Eastern District of New York is reported at 280 F. Supp. 473 and is also printed in full in the Appendix to this petition (A12-21).

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1969 (A22) and a timely petition for rehearing was denied on June 9, 1969 (A23). The time to file this

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* References to the Appendix will be preceded by the letter "A". All references without such designation will be to petitioner's Appendix in the Court of Appeals.

petition was extended from July 9, 1969 to August 8, 1969 by order of Mr. Justice Harlan, dated June 23, 1969 (A24).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a pattern of legislation has been created by the Universal Military Training and Service Act (50 U.S.C. App. §§ 451 *et seq.*) and Selective Service Regulation (32 C.F.R. § 1611.7[c]), prescribing a continuing duty to register, which compels a delinquent registrant to inculpate himself as to his initial failure to register, in violation of his rights under the Fifth Amendment as construed in *Marchetti* v. *U. S.*, 390 U. S. 39 (1968), *Grosso* v. *U. S.*, 390 U. S. 62 (1968), *Haynes* v. *U. S.*, 390 U. S. 85 (1968), and *Leary* v. *U. S.*, 395 U. S. 6, 23 L. ed. 2d 57 (1969)?

2. Whether Congress intended the offense of failing to register for selective service to be outside the provisions of the general five year statute of limitations (18 U.S.C. § 3282), which covers all non-capital offenses "Except as otherwise expressly provided by law."?

3. Whether the Universal Military Training and Service Act constitutionally empowers the executive branch to promulgate a regulation, that despite Congressional silence on the subject, makes registration a continuing duty?

4. Whether a conscientious objector can be denied the right under the First Amendment to have a jury pass on the sincerity of his belief that he could not register for the draft for reasons of conscience?

Statutes Involved

The pertinent provsions of the Constitution (First Amendment and Fifth Amendment), statutes (50 U.S.C. App. §§ 453, 454(a) and 462(a); 18 U.S.C. § 3282), Executive Orders (Nos. 2799 and 2942), and Selective Service Regulations (32 C.F.R. §§ 1611.7, 1613.1-16, 1642.3), are all printed in the Appendix hereto (A25-44).

Statement

Petitioner was convicted in the United States District Court for the Eastern District of New York, upon a jury verdict, of having failed to register for the draft in violation of 50 U.S.C. App. § 462(a). He was sentenced pursuant to 18 U.S.C. § 4208(b), being committed to the custody of the Attorney General for study and report. The indictment charged in one count that the crime was committed over the course of an 8-year period from June 23, 1959 (the date of petitioner's 18th birthday) through February 3, 1967, "both dates being approximate and inclusive" (5a).

Petitioner admittedly never registered for the draft on his 18th birthday or at any time thereafter. He could not do so for reasons of conscience. The trial was devoted in substantial degree to presentation of petitioner's conscientious beliefs and their development, although the trial court did not permit the issue to be passed upon by the jury. There was an abundance of testimony, demonstrating that his convictions were sincerely held, being the product of upbringing and rooted in family tradition and having been formulated and publicly announced by petitioner years before the statutorily mandated time of registration for the draft.

Among the significant evidence adduced on the issue, was a copy of petitioner's proposed valedictory address

to be delivered upon graduation from junior high school, which he wrote at the age of 14 (149a-51a). Petitioner was denied the valedictory honors because of the virulent anti-war theme of the text and his refusal to change it (147a). The act of registration to petitioner was an inextricable part of the military process. He believed that registration constituted acquiescence therein and he could not bring himself to do so.

The evidence also showed that these views of petitioner coalesced with factors of an emotional and psychological nature to prevent him from registering. Medical and psychiatric testimony was offered and it was urged on the basis thereof that petitioner also lacked capacity to formulate the requisite criminal intent for commission of the crime charged.

Petitioner moved before trial to dismiss the indictment on the grounds that it was time-barred under the 5 year general limitation provision of 18 U.S.C. § 3282 and constitutionally defective in violation of the Fifth Amendment (6a-36a). The District Court (Dooling, J.) prior to the decisions by this Court in *Marchetti, Grosso* and *Haynes,* denied the motion. The said motions were renewed during the course of trial and, together with the other relevant motions made on petitioner's behalf, were also denied (Mishler, J.).

A companion motion to dismiss an indictment involving petitioner's brother was simultaneously made and granted by Judge Dooling on the ground that the said prosecution was time-barred (38a-40a). The Government took a direct appeal to this Court from the said order of dismissal. On review by the Solicitor General, however, that appeal was withdrawn.

Reasons for Granting the Writ

Summary

Important questions of constitutional and statutory construction, all of first impression, are here presented. The Court of Appeals, while rejecting petitioner's contentions, characterized the questions as "substantial" (A2) and "novel" (A6)—and further indicated, we submit, in its discussion of the issues and problems raised, that review by this Court is warranted.

I.

The theory adopted by the Court below to avoid the 5 year statute of limitations was that the selective service regulations imposed upon petitioner a "continuing duty" to register, even after age 18.

We maintain that if the statute and regulation imposed upon the petitioner a continuing *duty* to register, despite his initial failure to register at age 18, such compulsion to register thereafter compels self-incrimination in violation of the Fifth Amendment. For the registration itself would expose the delinquent registrant to prosecution for his failure to register on time. This is the first time that the Fifth Amendment has been invoked to challenge the registration provisions of the draft law. We believe that its application is mandated under the decisions of this Court in *Marchetti, Grosso, Haynes* and *Leary.* All relevant tests propounded by those decisions have been satisfied here. In particular, since registration in accordance with the regulations could not be accomplished without divulgence by the registrant of his date of birth, among others, a "real and appreciable" hazard of incrimination as to the prior failure to register (which would be automatically divulged thereby) is created.*

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*We note, that the Court has granted certiorari for argument next term in No. 1144, *Breen* v. *Selective Service Local Board No.*

(*footnote continued on following page*)

A strange concept has been introduced to Federal criminal jurisprudence by the determination below. A continuing crime has been fashioned where the defendant must confess guilt in order to terminate its continuance and start the statute of limitations running. Such a requirement is inimical to the Fifth Amendment and subversive of the legislative policy reflected in statutes of limitation. Its perpetuation should not be permitted by this Court.

II.

We urge that the 5 year general statute of limitations (18 U.S.C. § 3282) commenced running on petitioner's 18th birthday and bars the instant prosecution. This result is dictated by the plain language of the general limitation statute and the relevant provisions of the Universal Military Training and Service Act which has no separate or different limitations period. The Court below, without a statutory basis, relied upon a selective service regulation to impose a "continuing duty" to register beyond age 18. It permitted an act of the Executive branch to extend the scope of a crime beyond the limits of its statutory definition and to render the legislatively prescribed limitation period meaningless. The regulation, as construed, permits an unconstitutional usurpation by the Executive of Legislative prerogatives. There is no evidence of a legislative intent to treat offenses under the draft law different from other offenses covered by the general statute of limitations.

The Court below adopted the continuing duty theory, but held that the duty to register, and hence the crime, continued only to age 26. This theory, an untenable compromise, as we demonstrate below, presents a conflict in Circuits. The Fourth and Sixth Circuit Courts of Appeal

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(*footnote continued from previous page*)

16 and in No. 1176, *Gutknecht* v. *U. S.*, in which other aspects of Fifth Amendment claims will be reviewed. We understand, too, that the Government has taken a direct appeal to this Court in *U. S.* v. *Sisson*, 297 F. Supp. 902 (D. C. Mass. 1969, Wyzanski, J.).

have not imposed a cutoff date at age 26, but imply that the statute never runs (*McGregor* v. *U. S.*, 206 F. 2d 583 [4th Cir., 1953]; *Gara v. U. S.*, 178 F. 2d 38, 40 [6th Cir. 1949], affd. 340 U. S. 857 [1950]; cf. *Vogel* v. *U. S.*, 162 F. 2d 54 [5th Cir.], cert. denied 332 U. S. 791 [1947]). The Second Circuit commented that such view, reflected in the Fifth and Sixth Circuit decisions, was "unfair and absurd" (A5). Resolution of the issue remains for this Court. In the only prior case reaching this Court where the question was presented (*Gara* v. *U. S., supra*), the decision below was affirmed without opinion by an equally divided Court.

The force of petitioner's contentions on the statute of limitation issue and the difficulties inherent in the statutory scheme, led the Court below to conclude that

> "It may be that application of the statute of limitations to this area deserves particularized congressional attention, with a statute, rather than regulations, stating the applicable limitation periods." (A6)

We contend that Congress has already passed such a statute (18 U.S.C. § 3282), which there is no valid reason to ignore.

The presence of a host of unresolved "problems lurking in the background" (A6) were further noted by the Court below, all of which are integrally related to the question of Congressional intent. Thus, as the Court below noted, "is each day of failure to register a separate offense, for which a prosecution can be brought?"; "Can the knowing and wilful failure to register when the duty first attaches be legally cured by a subsequent tardy registration?"; "are there other continuing duties under the selective service system that are not cut off at age 26, and, if so, when, if ever, does the statute of limitations run as to them?" (A6). Resolution of the foregoing questions, as well as

the orderly and proper administration of the Universal Military Training and Service Act in a manner consistent with the statutory mandate and constitutional principles is dependent upon the grant of review by this Court. The far reach of this statute and the large number of young men who are delinquent make the issue one of supreme public importance.

III.

The final issue presented relates to the First Amendment and its application to one's conscientious beliefs. We maintain that consistent with this Court's decision in *Girouard* v. *U. S.*, 328 U. S. 61 (1946), a defendant is constitutionally entitled to have the jury pass upon the sincerity of his conscientious beliefs and to acquit if it finds that the failure to register was a result thereof. *U. S.* v. *Nugent*, 346 U. S. 1 (1953), relied upon by the Court below (A10), did not treat with the issue. The trial judge refused to submit this question to the jury. It remains a matter of first impression for clarification by this Court, although we believe the language in *Clark* v. *Gabriel*, 393 U. S. 256, 259 (1968), supports our view.

ARGUMENT

As to question 1:

The Fifth Amendment precludes application of the continuing duty theory to the act of registration.

The Courts below held that the Selective Service Regulation (32 C.F.R. §1611.7[c]) imposed a "continuing duty" to register on a delinquent who had initially failed to register at age 18.

Our position may be stated as follows: If it is held that one has a continuing duty to register, under penalty of criminal sanction, registration at any time after the date first required therefor is tantamount to compelling an ad-

mission of criminal culpability for prior failure to register. Registration cannot be compelled under penalty of criminal sanction at any time after the date first prescribed therefor; for otherwise one is being required to confess guilt in violation of Fifth Amendment guarantees (*Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 [1965]; *Marchetti* v. *U. S., supra; Grosso* v. *U. S., supra; Haynes* v. *U. S., supra; Leary* v. *U. S., supra*).

If there is a continuing duty to register, it is not accompanied by a statutory immunity from prosecution for a late registration. The duty to register, after the date of initial registration has passed, is still compulsory, but the very act of compliance renders the late registrant subject to criminal prosecution. This is compulsory self-incrimination in its simplest form.

It is as if there were two registration statutes: (1) a statute requiring registration on the first day; and (2) a statute requiring registration thereafter with a provision that compliance under the second statute renders the registrant subject to prosecution under the first statute. Even though the duty may continue, there is no doubt that a wilful failure to register when first required to do so made a completed crime. That being so, subsequent registration itself may be tantamount to a confession—and a confession compelled by the continuing duty theory. The failure to provide for a statutory immunity coextensive with the constitutional privilege makes the late registrant as vulnerable to prosecution as the Communist party member, the gambler, or the marijuana possessor. (See also *U. S.* v. *Rosenson,* 291 F. Supp. 874, 876 (E. D. La. 1968) for application of this Court's decisions to a prosecution for failure to register and surrender, upon re-entry, a certificate evidencing a prior registration, required to have been obtained before leaving the United States.)

The standard emerging from this Court's decisions for application of the Fifth Amendment is the "substantiality

of the risks of incrimination" which confront the claimant. (See e.g., *Marchetti* v. *U. S.*, 370 U. S. at p. 54). If the hazards created are "real and appreciable," application of the Fifth Amendment is required (*Haynes* v. *U. S.*, 390 U. S. at p. 97). These tests were deemed satisfied in *Marchetti,* the Court observing that under the registration provisions there involved, the defendant "was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in the chain' of evidence tending to establish his guilt" (390 U. S. at p. 48).

Similarly, in *Haynes,* the prospective registrant could reasonably fear that the possession established by his registration would facilitate his prosecution under the making and transfer clauses of § 5851; and that the information required to be furnished under the registration statute was "likely to facilitate their arrest and eventual conviction."

The regulatory scheme involved in the case at bar utterly failed to provide a means for one who had previously failed to register to subsequently register without requiring him to sign a confession of guilt. This is far more than the mere "facilitat[ion]" of "his prosecution" (*Haynes* v. *U. S., supra*), sufficient to require application of the Fifth Amendment.

Thus, we refer to the applicable regulations in Title 32 C.F.R. § 1613.1—16. It is first provided in § 1613.11(a) that "every registrant before being registered shall enter his name and place of residence upon one of the numbered lines on the Tally Sheet" and "shall be registered on a Registration Cart (SSS Form No. 1)." Among the more significant items which must be included on the form, which the registrant is required to divulge (and its accuracy ensured by the registrar), is the registrant's *date of birth* (§1613.12[c]).

The context of the foregoing procedures is one of compulsion, in its entirety, by direct mandate of the statute

and the regulations. Section 1613.16 of the regulations, as well as § 462 of the Act, contemplate stiff penalties (5 years) for failure to divulge the information. Immediate referral of the matter to the United States Attorney is also mandated by the regulations. "Persons attempting to obstruct or delay" registration, the regulations further provide "should be dealt with promptly and firmly" (32 C.F.R. § 1613.16).

Section 1642.3 provides that compliance by the draft board with procedures concerning delinquency (i.e., warnings to registrants) is not a condition precedent to prosecution under Title 1, § 12 of the Military Selective Service Act of 1967 (50 U.S.C. App. § 462).

The only way a registrant could terminate his "continuing duty" would be to incriminate himself by late registration. In other so-called "continuing offenses" like conspiracy, the defendant does not have to perform an act of self-incrimination in order to abandon the conspiracy. Under the reasoning of the Court below there is no way to abandon the "continuing offense" except by the act of registering—an act of compulsory self-incrimination.

The reasoning of the Court of Appeals, distinguishing the *Albertson, Marchetti, Grosso* and *Haynes* decisions, is that "his (petitioner's) inaction did not give rise to the threat of punishment beyond that he had already risked" (A9). The distinction is invalid. The Fifth Amendment does not deal with punishment, but with *evidentiary* self-incrimination.

The constitutional test, we submit, is not whether additional punishment is provided but whether the statute, as construed, requires the individual to perform an act which is self-incriminatory. Analysis will be furthered by treating the draft registration statutes as two statutes as previously discussed, *supra,* p. 9.

The Communist or gambler at least gets absolution from prosecution under the registration statute by registering;

the man who registers late for the draft does not. He has merely begun the process of convicting himself.

These views have been re-emphasized by the Court in the recent *Leary* decision, as follows (395 U. S. at p. 18):

> "Since compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination."

So, too, in contrasting the right of an accused under the Fifth Amendment to remain silent at his trial, the Court in *Leary* aptly characterized the aspect of the privilege here involved as "the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act" (395 U. S. at p. 28).

The Court below conceded that it is, indeed, "arguable" that the continuing duty regulation "is directed at a 'selective group inherently suspect of criminal activities' *Albertson* v. *Subversive Activities Control Board, supra,* 382 U. S. at 79" (A7-8). The group who failed to register at 18 are a "selective group inherently suspect of criminal activities". It is well-known that there are many young men in this group who are colloquially known as "draft resistors". It is to this group that the regulation addresses itself with a continuing duty.

The Court below proceeded to reason, however, that "many initial failures to register may be due to such innocent reasons as illness, ignorance, or inability to get to a local board" (A8). So, too, there may be a lawful possessor of marijuana, or a legitimate possessor of firearms, etc. This does not preclude application of the constitutional privilege to the statute at bar. The Fifth Amendment applies, as here, where the status disclosed as a result of the subsequent registration is "presumptively"

indicative of guilt or *prima facie* on the issue (*Russell* v. *U. S.*, 306 F. 2d 402, 411 [9th Cir. 1962]; cited with approval by this Court in *Haynes, supra*). Similarly, the Court held in *Albertson, supra*, that it is sufficient if the information called for by the registration forms "might be used as evidence in or at least supply investigatory leads to a criminal prosecution" (382 U. S. at p. 78).

We hardly need remind the Court, moreover, that the protection of the Fifth Amendment extends to the innocent as well as the guilty (*Grunewald* v. *U. S.*, 353 U. S. 391 [1957]). Here the delinquent registrant would be faced with the burden of showing he had been ill or ignorant, for he is presumptively guilty of an act of omission.

Under the decision of the Court below a person *must* first submit himself to prosecution under his continuing duty in order to invoke the Fifth Amendment. The protection of the Fifth Amendment, we submit, cannot be so circumscribed.

The Court below while "conced[ing] that doing so might well focus unwanted attention" on the delinquent registrant, maintained that "it may be possible for a young man to register late without giving the incriminatory information, cf. *United States* v. *Sullivan*, 274 U. S. 259 (1927)" (A8). We assume the Court of Appeals had in mind the appearance of the young man at the draft board, and his invocation of the Fifth Amendment in response to certain questions which he is required to answer, such as the date of his birth.

In the first place, the appearance of the young man at the draft board without giving the required information would not serve to qualify him as having submitted to registration in accordance with the prevailing case law. (See e.g., *Michener* v. *U. S.*, 184 F. 2d 712 [10th Cir. 1950]; see also *Cannon* v. *U. S.*, 181 F. 2d 354 [9th Cir. 1950]; *U. S.* v. *Henderson*, 180 F. 2d 711 [7th Cir. 1950]; *Richter* v. *U. S.*, 181 F. 2d 591 [9th Cir. 1950]).

Secondly, such a procedure would serve to emasculate the constitutional provision. Invocation of the Fifth Amendment under such circumstances would be an unmitigated admission of criminal culpability. As the Court stated in *Marchetti, supra,* "to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it' " (390 U. S. at p. 50).

Appearance at the draft board under the circumstances here projected, would require invocation of the Fifth Amendment even as to divulgence of the defendant's name (cf. *Kaohelaulii* v. *U. S.*, 389 F. 2d 495 [9th Cir. 1968]).*

"[B]arring" the use of any "possibly incriminating information in any subsequent prosecution," as the Court of Appeals further suggested (A8), adopting Judge Dooling's reasoning, would not satisfy the mandate of the Constitution. The Court of Appeals, indeed, acknowledged that Judge Dooling's reasoning was before its rejection by this Court in the cases cited above (A8).

So, too, the balancing of constitutional interests alluded to by the Court of Appeals in its opinion (A7, A9-10), cannot further serve to preclude application of the Fifth Amendment. True, the Government is constitutionally authorized to raise an army. Self-registration—*to the extent that it will involve incriminatory admissions*—however, is not necessary to serve the legitimate governmental purpose. Alternative procedures for securing the necessary information could well be utilized without impinging upon the rights guaranteed by the Fifth Amendment. Such was the express reasoning of this Court in *Marchetti* and *Haynes,*

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* In *Kaohelaulii,* defendant reached the age of 18 on January 28, 1956. He did not register for the draft, however, until 8 years later, on October 15, 1964. Immediately after his tardy registration, he was interviewed by agents of the FBI and thereafter indicted and convicted for having failed to register for the draft on his 18th birthday or thereafter until his appearance at the board to do so on October 15, 1964.

supra, where it was stated in relevant part that the Court was "fully cognizant of the Treasury's need for accurate and timely information, but other methods, entirely consistent with constitutional limitations, exist by which such information may be obtained" (*Haynes*, 390 U. S. at p. 98; see also *Marchetti*, 390 at U. S. at p. 60).

The sources for securing such information and procedures satisfying the need of the Government for information are available without compelling the defendant to provide the information and inculpate himself. For example, municipal Boards of Health (birth certificates) or Boards of Education (school records) could be required to file duplicate copies of their records with the appropriate Federal authorities and thus preserve the integrity of the Fifth Amendment.

The now accepted safety value of the immunity statute, may also be utilized. It would be a simple matter for Congress to grant immunity from prosecution to those questioned and required to divulge information in connection with registration. Under such circumstances, one who failed to register on his 18th birthday might, if Congress so dictated, be subjected to the continuing duty to register. He could not then avail himself of the protection of the Fifth Amendment for failure to do so since his own statements could not be used. In terms of practical effect, moreover, the use of an immunity provision would serve a salutary purpose. A young man at the age of 18, impressionable and immature in many ways, may have been impelled for misguided reasons to breach his duty of registration. In later years (or for that matter on the day following 5 days after his 18th birthday when he breached his duty by failing to register), he may well recognize the folly of his ways. However, without the protection of the Fifth Amendment (or in lieu thereof, an immunity statute), he is afraid to register for fear that he will be prosecuted for previously failing to do so. The result, in the absence of immunity, is, in practical effect, to frustrate the very

Congressional purpose, which the registration provisions were designed to effectuate.*

We recognize that it may be argued that *Marchetti* and the cases following it all relate to possible self-incrimination in State Courts through the compulsion of registering under a Federal statute. We do not believe the distinction to be valid because the Fifth Amendment is equally applicable to Federal crimes. In any event would this not be the very next question that properly confronts the Court under the doctrine of *Leary*?

As to questions 2 and 3:

The offense charged was time-barred by the five year limitation period prescribed by 18 U.S.C. § 3282; any other construction is constitutionally invalid as an executive usurpation of legislative power.

The relevant statutory provisions giving rise to the crime here charged are 50 U.S.C. App. § 453 (establishing the duty to register) and § 462 (prescribing penalties for violation of the act). Presidential Proclamations No. 2799 and No. 2942 set forth the specific dates for registration, providing in respect of petitioner that he register on his 18th birthday or within five days thereafter (Pres. Proc. No. 2799 subd. [j]).

The general statute of limitations (18 U.S.C. § 3282) provides that a person may not be prosecuted, tried or punished for an offense unless indicted within five years next after its commission "Except as otherwise expressly provided by law."

The Universal Military Training and Service Act does not "otherwise" provide a separate and different statute of limitations.

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* The immunity would, of course, not apply if the non-registrant was apprehended for failure to register by other than self-incriminatory means.

The Courts below avoided the 5-year limitation period by holding that the offense was a continuing one in reliance, not upon the statute, but upon a Selective Service regulation (32 C.F.R. § 1611.7[c]), which provided that "(c) The duty • • • to present himself for and submit to registration *shall continue at all times* • • •." (emphasis supplied).

The Court of Appeals frankly conceded that "the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the staute beyond its stated term" (A4). It recognized that the continuous offense doctrine was not mandated by the statute, but by the regulation. Despite this the Court held the indictment not to be time-barred on two grounds:

1. That the 5 year statute *is* being recognized, but that it does not begin to run when the crime is completed because the regulation prescribes a continuing duty; and

2. That if the 5 year statute is in fact deemed extended, it is because the continuing duty regulation is an express provision of "law" (A5-6).

It expressly held, moreover, that the regulation is not outside the Congressional grant of power (A5).

We contend that the Court erred in all of its alternative formulations.

1. The Court's concession that "for all practical purposes" (A4) the general 5 year statute of limitations has, indeed, been extended is more cogent than its lip service to the 5 year statute and its conclusion that the issue is merely when that statute begins to run.

(a) There is no expression of Congressional policy to indicate a desire by Congress to have a different statute of limitations apply to failure to register for the draft than to other crimes. Where Congress intended to im-

pose a continuing duty with respect to selective service, it knew how to say so.

Unlike § 453, § 454 does contain a continuing duty provision. Thus, § 454(a) further provides that any registrant who has failed or refused to report for induction "*shall continue to remain liable for induction* and when available shall be immediately inducted" (emphasis supplied).

(b) The enunciation of a continuing offense theory poses hard questions which the Court of Appeals frankly recognized as "problems lurking in the background" (A6).

It is no answer for the Court of Appeals to elide the question on the ground that a particular indictment "charged only one offense—wilful failure to register over a lengthy period of time—and appellant never did register" (A6). Even if the "continuing duty" theory did convert the failure to register into a single offense, the question still remains when that offense was committed or completed. Could a registrant defeat an indictment by claiming that he still had time to register at any time up to age 26? Such a contention would be absurd. But its very absurdity shows that the crime was completed and indictable when the petitioner failed to register on attaining the age of 18 years. And there is no statute evidencing a Congressional intent that the ordinary consequences—the running of the general 5 year statute of limitations *from that time*—should not follow.

We submit that in the absence of any statute the general statute of limitations creates a jurisdictional fact which the prosecution must prove. A plea to the statute of limitations is a plea to the merits (*U. S.* v. *Barber*, 219 U. S. 72, 78 [1911]). Such a plea affects his liability "as matter of substantive law" (Holmes, J. in *U. S.* v. *Oppenheimer*, 242 U. S. 85, 87 [1916]; see also *People* v. *Hines*, 284 N. Y. 93 [1940]). We believe there is no

precedent for creating a jurisdictional element contrary to the statute itself.

The continuing offense theory, moreover, aside from having no statutory warrant, logically makes prosecution possible without any limitation whatever. Thus, under the wording of the regulation, a person 70 years old can be prosecuted for having failed to register 52 years before at the age of 18.

Contrary to the regulations, the statute and proclamations prescribe specific dates and not a period of years for accomplishment of the registration. With respect to persons who are outside the existing category of 18 through 26 as of the time the statute took effect (like petitioner) Presidential Proclamation No. 2799, subd. (j) of paragraph 1, simply provides that "Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter". Presidential Proclamation No. 2942 issued in 1951 makes similar provision.

It is thus evident that a person is given only one date to register. With respect to those reaching the age of 18 years after the effective date of the statute (like petitioner), that one specific date is when he reaches the age of 18 years and 5 days.

We submit that if a person fails to register on the prescribed date or within the 5-day period thereafter, as above set forth, the breach of duty occurs then and there. There is nothing in the statutory scheme which says that the breach of duty continues for 8 years, as the Court below found.

2. To the extent that the regulations import a concept of duty to register beyond the dates prescribed by the statute, the breach of which gives rise to criminal culpability, we

submit that an unconstitutional usurpation of legislative authority has been effected.

The argument of the Court of Appeals, in this respect also, is untenable. Historically an extension of a statute of limitations is a legislative, not an executive function.*

When Congress used the phrase "Except as otherwise expressly provided by law," it meant by statute not executive order. The enactment of statutes of limitation is so exclusively within the legislative sphere that it would strain language to hold that Congress intended so serious a departure from the clear historic meaning of "law" in

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* The very phrase "statute" of limitations connotes legislative action. An early statute of limitations in England was created by Parliament, not the King. (The Treason Act, 1695 [7 and 8, Will. IIIc. 3]; 9 Halsbury Statutes of England 82).

The first criminal statute of limitations after the adoption of the Constitution was by Act of April 30, 1790, Ch. 9 § 32, 1 Stat. 119 (See 18 U.S.C. § 581-3).

In the Colonies before the Revolution limitations for prosecution of crime were by the Colonial legislatures (see 102 Univ. of Pa. L. Rev. 630, 631 [1954], citing Whitmore, Colonial Laws of Mass. 163 [1889]; Charter and Laws of the Province of Pa. 1682-1700 [173-4] (George, Neod and McComant [1879]).

As early as 1684 there was a 6 months limitation on offenses against the Government, but the limitation was created *by statute*. (See also Howe, Readings in American Legal History 19 [1949], Radin, Anglo-American Legal History § 79 [1936].)

The common understanding of the Bar is expressed in ALI Model Penal Code, Tentative Draft No. 5, § 1.07(4): "An offense is committed either when every element occurs, or, if a *legislative* purpose to prohibit a continued course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed" (emphasis supplied).

The American Law Institute there comments, p. 23: "The draft in effect provides a presumption against a finding that an offense is a continuing one for purposes of time limitation. The assumption is that the continuing offense exception too freely applied is inconsistent with the purpose of time limitations. See, for example * * *, *Fogel* v. *U. S.*, 162 F. 2d 54 (1947)."

this context. This is particularly so upon examination of the various recognized exceptions to the 5 year general limitation provision.

In accordance with the mandate of 18 U.S.C. § 3282 ("Except as otherwise *expressly* provided by law"), when Congress wanted a crime to be continuing in nature and the limitation period kept open, it said so. We are unaware of a single instance where a limitation period has been tolled or extended by administrative or executive decree. In every instance, to our knowledge, where this has been done, there is an express statute so providing.

A striking instance may be found in 50 U.S.C. App. § 454(a), above quoted, which expressly declares, in relevant part that a delinquent inductee "shall continue to remain liable for induction."

In further contrast to the statute at bar, we refer, for illustrative purposes, to the offense of concealment of a bankrupt's assets under 18 U.S.C. § 3284. Congress there expressly provided that such offense shall "be deemed to be a continuing offense" until the debtor is discharged or a discharge is refused; and that the period of limitations "shall not begin to run" until such time. In the absence of statute, the crime had been held not to be a continuing offense (*Warren* v. *U. S.*, 199 Fed. 753 [5th Cir., 1912]).

We submit that express Congressional direction in a manner consistent with the foregoing, absent in the situation at bar, is necessary to exclude a case from the operation of 18 U.S.C. § 3282.*

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*We urge that "by law" means by "statute" historically. This is supported by Reviser's Note to 18 U.S.C. § 3282 which says: "Section 582 of Title 18, U.S.C. 1940 ed. and Section 746(g) of Title 8, U.S.C., 1940 ed., Aliens and Nationality, were consolidated. 'Except as otherwise expressly provided by law' was inserted to avoid *enumeration* of exceptive provisions" (emphasis supplied). This obviously meant statutory provisions.

As the regulation was construed below, it is unconstitutional as an executive usurpation of well-defined historical legislative power. Only Congress can extend or provide for the tolling of its own statutes. While it is perhaps fashionable these days to fudge the separation of powers as constitutional doctrine, the rule is firmly embedded in our constitutional tradition that the executive may not legislate as such (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 [1935]; *A.L.A. Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495 [1935]).

It is constitutionally forbidden for the Executive branch to create a continuing offense without a specific mandate from Congress. History, as we have seen, *supra*, shows a number of continuing offenses created by Congress itself. We know of no such history for the Executive branch.

The suggestion that the Executive branch had the right to create a continuing offense under the Universal Military Training and Service Act is like saying that the Commissioner of Internal Revenue has the right to prescribe by regulation that a failure to file an income tax return is a continuing offense. It would be for Congress and Congress alone to make such a determination.

The Court below assumed, moreover, that the statutory language presumably showed an intention on the part of Congress to permit the President to make the duty to register a continuing duty. It relied upon the language giving the President power to fix the time or times and place or places for registration (A4).

We submit that a close reading of the statute (50 U.S.C. App. § 453) indicates that the reference to "such" time or times or place or places indicates that it is in apposition to the first and each subsequent registration proclaimed by the President. It is more likely that when Congress said *at* such time or times and place or places, it meant specific days and time of day. The requirement is that he register

on the day or days fixed for the first or any subsequent registration and that he must present himself at such time or times or place or places. This construction is fortified by the circumstance that Congress has specifically provided for a *continuing* liability for induction (18 U.S.C. §454[a]), although it did not do so for registration.

It is true, as the Court of Appeals noted in its opinion (A3-4), that the prior decisions on the subject have held that a continuing duty obtains, which serves to preclude application of the statute of limitations (*Fogel* v. *U. S.*, 162 F. 2d 54 [5th Cir.], cert. denied, 332 U. S. 791 [1947]; *McGregor* v. *U. S.*, 206 F. 2d 583 [4th Cir. 1953]; *Gara* v. *U. S.*, 178 F. 2d 38, 40 [6th Cir. 1949], affd. 340 U. S. 857 [1950]). But it does not appear that the constitutional question was raised.*

Indeed, a conflict exists even between those cases and the decision of the Court of Appeals below. In *McGregor* and *Gara, supra,* the continuing duty imposed was deemed to be open-ended with no time limitation whatever. The Court in this case recognized that such logical extension of the holdings in those cases was "unfair and absurd" (A5). It, therefore, imposed a cutoff date at age 26. A conflict of interpretation, therefore, now exists between the Second Circuit in this case and the Fourth and Sixth Circuits in the *McGregor* and *Gara* cases. *Gara* reached this Court. It was affirmed, however, by an equally divided Court. Resolution of the issue is, therefore, a matter of first impression for this Court.

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* The Court of Appeals also cited *U. S.* v. *Guertler,* 147 F. 2d 796 (2d Cir. 1945). The crime there involved, in our view, was not "analogous" (A4). It involved a *change* of status—to wit: the registrant moved his residence. It is reasonable to require the registrant to notify the local draft board of such change of residence The same reasoning, however, does not apply to a failure to register on a fixed date. Having failed to register on the date prescribed, no change in status thereafter occurs of which the board requires notification.

As to question 4:

Petitioner was entitled under the First Amendment to have the jury pass on the sincerity of his conscientious beliefs which prevented him from registering.

Petitioner requested the following charge to the jury, which was denied by the trial court:

> "15. If you find from the testimony in this case that the defendant held a conscientious and religious belief that the act of registration was only another extension of war, violence and legalized killing, and if you believe that the defendant's failure to register arose from such belief, then you must find the defendant not guilty." (50)*

In its main charge the Court stated:

> "* * * and if * * * he nevertheless chose to disregard the law and abide by what he believed to be a higher moral principle, his reason, his motive for failure to register under those circumstances, is not an answer to this charge." (286a)

We maintain that this was constitutional error and that the Court should hold that the First Amendment's guaranty of freedom of conscience bars the prosecution of one who failed to register on the grounds of conscientious belief sincerely held; that, at the very least, he is entitled to have a jury pass on the issue.

The Court of Appeals recognized that "a proper test of a civilized society is the solicitude with which it treats its principled dissenters", and that "in theory the sincerity

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* See also Request to Charge No. 17 (50a). Other instructions were requested as to the sincerety of petitioner's beliefs and also denied (Requests to Charge No. 4 and No. 5 [48a-49a]).

of one who claims that his conscientious beliefs prevented him even from registering could be tested by the trier of fact in a criminal trial" (A10).** Nevertheless, in reliance upon *U. S.* v. *Nugent,* 346 U. S. 1 (1953), the Court of Appeals held that "under present doctrine requiring them to register for eventual assignment to non-military alternative service is constitutional" and "the present procedures of administrative decision and judicial review do not constitute an infringement of the first amendment" (A10-11).

This fails to cover the situation where a conscientious objector truly believes that adherence to the registration system itself is contrary to his fundamental beliefs.

Nugent, supra, merely discussed the availability of administrative remedy during the post-registration period. It did not discuss the situation here presented. If a conscientious objector fails to register *because* of his beliefs, there is no tribunal that can pass upon the validity of such beliefs other than the trial jury when he is prosecuted. To take away from the trial jury the right to determine the bona fides of his conscientious beliefs is to invade that field of conscience which this Court has recognized in the case of other principled dissenters.

In contrast to *Nugent,* the Court's prior decision in *Girouard* v. *U. S.,* 328 U. S. 61 (1946) rather supports petitioner's position. There *U. S.* v. *Macintosh,* 283 U. S. 605 (1931) and *U. S.* v. *Schwimmer,* 279 U. S. 644 (1929) were overruled. Chief Justice Hughes, dissenting in *Macintosh* (joined by Justices Holmes, Brandeis and Stone) had maintained that objection to bearing arms as

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** The sincerity of petitioner's beliefs, grounded in family tradition, upbringing and independent pursuit of pacifism from the age of 11—highlighted by his anti-war validictory address at the age of 14—were more than amply demonstrated during the course of the trial below; and accordingly, there was substantial basis in the record for the charge requested.

a matter of conscience was protected by the First Amendment. He wrote, in relevant part (283 U. S. at p. 634):

> "The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field."

A citizen who refuses to register for the draft acts at his peril, since the jury may readily find that the alleged conscientious beliefs which impelled his dereliction were not sincere. It is submitted, however, that the First Amendment, at the very least, consistent with the pronouncements of this Court in *Girouard* and the *Macintosh* dissent, guarantees to him the right to have the jury pass on the issue where he is on trial for his liberty.

CONCLUSION

Under all the circumstances hereinabove set forth, it is respectfully prayed that the writ of certiorari should be granted.

Respectfully submitted,

MURRAY I. GURFEIN,
Attorney for Petitioner.

JACOB W. HELLER,
Of Counsel.

Appendix A

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 518—September Term, 1968.

(Argued April 17, 1969 Decided May 14, 1969.)

Docket No. 33106

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT I. TOUSSIE,

Appellant.

Before:

WATERMAN, SMITH and FEINBERG,

Circuit Judges.

Appeal from conviction in the United States District Court for the Eastern District of New York, after a jury trial before Jacob Mishler, *J.*, for failing to register for selective service in violation of 50 U.S.C. App. § 462(a). Affirmed.

HENRY G. SINGER, Brooklyn, N. Y. (Jacob W. Heller, on the brief), *for Appellant.*

JEROME C. DITORE, Assistant United States Attorney (Vincent T. McCarthy, United States Attorney for the Eastern District of New York, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

After a jury trial before Jacob Mishler, *J.*, in the United States District Court for the Eastern District of New York, appellant Robert I. Toussie was convicted of having failed to register for the draft in violation of 50 U.S.C. App. § 462(a). Appellant was sentenced under 18 U.S.C. § 4208 (b), which commits him to the custody of the Attorney General for study and report, but sentence was stayed and appellant released on his own recognizance pending appeal. Although appellant raises a number of substantial questions, we conclude that his conviction should be affirmed.

Appellant never registered for selective service from June 23, 1959, when he became 18, to the time of his arrest and indictment in 1967. He claims that his sincerely held conscientious beliefs against war prevented him from doing so, that his prosecution was barred by the general five-year statute of limitations, 18 U.S.C. § 3282, that his conviction violated his fifth amendment right against self-incrimination, that there was insufficient proof of his mental capacity, and that there were errors in the charge of the trial judge. We turn first to the claim based on the statute of limitations.

I.

The command of 18 U.S.C. § 3282 is that:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Appellant's claim is that his offense, if any, was committed in June 1959 on his 18th birthday or a few days thereafter

so that his indictment in 1967, almost eight years later, was barred by the statute. The Government replies that the offense of failing to register is a continuing one; hence the prosecution was timely. This position is based upon a regulation issued by the President, 32 C.F.R. § 1611.7(c), which states:

> The duty of every person subject to registration to present himself for and submit to registration *shall continue at all times*, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be. [Emphasis added.]

See also 32 C.F.R. § 1642.2. Appellant rejoins that the regulation cannot change a single statutory offense to a continuing crime. The issue was raised in the trial court before John F. Dooling, Jr., *J.*, on a motion to dismiss the indictment, and Judge Dooling rejected appellant's contention. 280 F. Supp. 473 (E.D.N.Y. 1967).

Surprisingly, the issue has not been litigated frequently, although the few decisions favor the Government. In *Fogel* v. *United States*, 162 F. 2d 54 (5th Cir.), cert. denied, 332 U. S. 791 (1947), the continuing crime theory was applied to failure to register for the draft. Although the decision has been criticized,[1] the only other court of appeals that has considered the question has reached the same result, expressly citing *Fogel* with approval. *McGregor* v. *United*

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[1] See Note, The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution, 102 U. Pa. L. Rev. 630, 644-45 (1954); Stan. Intra. L. Rev. 39 (1948). See also Model Penal Code §§ 107(4), 108(1)(c), Comments (Tent. Draft No. 5, 1956).

States, 206 F. 2d 583 (6th Cir. 1953); cf. *Gara* v. *United States,* 178 F. 2d 38, 40 (6th Cir. 1949), aff'd on another point by an equally divided court, 340 U. S. 857 (1950). In addition, this court used a continuing duty theory in affirming a conviction for the analogous crime of failing to advise the local draft board of a change of address, *United States* v. *Guertler,* 147 F. 2d 796 (2d Cir. 1945). The only apparent contrary authority is a district court decision in *United States* v. *Salberg,* 287 F. 208 (N. D. Ohio 1923), involving World War I registration, but it is unclear whether any regulation then clearly made the duty to register a continuing one.

The tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term. On the other hand, we are faced with a regulation that clearly establishes a continuing duty and that has long been construed as creating a continuing offense. Appellant argues that the regulation is unconstitutional or unauthorized, but we do not think that is so. The statutory duty to register is set forth in 50 U.S.C. App. § 453, as follows:

> Except as otherwise provided in this title . . ., it shall be the duty of every male citizen of the United States . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

The regulation here involved was promulgated by the President through an Executive Order and does deal with the days and times for registration. Moreover, the President

is authorized by 50 U.S.C. App. § 460 to prescribe rules and regulations necessary for the operation of the selective service system. We could not fairly say that the regulation is outside the congressional grant of power unless it were construed to create an unending duty because of the phrase "shall continue at all times." That is the meaning appellant ascribes to it, envisioning a prosecution at age 70 for failure to register 52 years before at age 18. This contention is understandable in view of the simultaneous indictment of appellant's brother Samuel, who was then almost 33.[2] Were that reading of the regulation correct, we agree that the result would be unfair and absurd. But Judge Dooling found that construction unwarranted and construed the continuing duty to end at age 26, a ruling with which we agree. The power to compel registration flows from the statute which, by its terms, applies only to males between the ages of 18 and 26; the regulation can do no more and should not be construed to attempt to do so. *Cf.* 32 C.F.R. § 1642.12.

Appellant also argues that the general five-year statute of limitations must apply "Except as otherwise expressly provided by law," and that Congress has made no such plain exception for the crime charged here. It might be enough to point out in response that the five-year statute is being applied; the issue is when it starts to run. But, more fundamentally, even if construed as an extension or a tolling of the statute of limitations to five years after

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[2] Judge Dooling held that the 5-year statute of limitations in 18 U.S.C. § 3282 had run as to Samuel and dismissed the indictment. But see *McGregor* v. *United States*, 206 F. 2d 583 (6th Cir. 1953) (indictment at age 30 when predecessor to 18 U.S.C. § 3282 was a 3-year statute of limitations); cf. *Fogel* v. *United States*, 162 F. 2d 54 (5th Cir.), cert. denied, 332 U. S. 791 (1947), motion for new trial denied, 167 F. 2d 763 (5th Cir.), rev'd, 335 U. S. 865 (1948) (*per curiam*).

age 26, the continuing duty regulation is an express provision of "law."

We are aware of other problems lurking in the background, some of which appellant has called to our attention. For example, is each day of failure to register a separate offense, for which a prosecution can be brought? Cf. *Gara* v. *United States, supra.* Can the knowing and wilful failure to register when the duty first attaches be legally cured by a subsequent tardy registration? The Government, in its brief, flatly answered the first question no; an affirmative answer to the second would be questionable at best. However, since the indictment here charged only one offense—wilful failure to register over a lengthy period of time—and appellant never did register, neither issue is squarely raised, except in connection with the fifth amendment argument discussed below. Moreover, are there other continuing duties under the selective service system that are not cut off at age 26, and, if so, when, if ever, does the statute of limitations run as to them? It may be that application of the statute of limitations to this area deserves particularized congressional attention, with a statute, rather than regulations, stating the applicable limitation periods. But the only question before us on this phase of the case is whether the five-year statute of limitations had run on appellant's offense of failing to register up to age 26. We conclude that on this record that defense was properly rejected by Judge Dooling.

II.

Appellant's second claim is that if the statute of limitations did not bar prosecution more than five years after his initial failure to register then the fifth amendment does. The claim is a novel one in the draft registration area, although in *United States* v. *Olson,* 253 F. 233 (W. D.

Wash. 1917), a different type of self-incrimination claim involving World War I registration was made and rejected. See generally Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 125-58. However, appellant draws heavily on recent decisions of the Supreme Court, reversing convictions for failure to comply with other registration statutes on the ground that compliance would have required the registrant to incriminate himself. See *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965) (failure to register as member of the Communist Party); *Marchetti* v. *United States,* 390 U. S. 39 (1968) (failure to register as gambler); *Grosso* v. *United States,* 390 U. S. 62 (1968) (failure to pay gambling tax); *Haynes* v. *United States,* 390 U. S. 85 (1968) (possession of unregistered firearm). Appellant's attack is focused solely on the continuing duty regulation. That regulation, it is argued, could not legally be applied to appellant because compliance would have compelled him to disclose his birth date and age, thereby admitting criminal culpability for his prior failure to register. Cf. *United States* v. *Rosenson,* 291 F. Supp. 874 (E. D. La. 1968).

This argument immediately brings to mind several considerations, some suggested by the Government. Thus, there is no claim that, as in the cited cases, the initial requirement of registration for selective service runs afoul of the self-incrimination privilege. The government interest being furthered—the raising of an army—is most significant, and self-registration is probably necessary to enforce the statutory scheme. The purpose of registration is not to detect and prosecute a certain type of criminal, e.g., gamblers, but to select those available and qualified for military service. While it is arguable that the continuing duty regulation is directed at a "selective group inherently suspect of criminal activities," *Albertson* v.

Subversive Activities Control Board, supra, 382 U. S. at 79, many initial failures to register may be due to such innocent reasons as illness, ignorance, or inability to get to a local board. Moreover, the regulations indicate that the aim is get qualified registrants—even delinquent ones—into the armed forces rather than into jail.[3] Cf. *United States* v. *Minor,* 398 F. 2d 511 (2d Cir. 1968). In addition, it may be possible for a young man to register late without giving the incriminatory information, cf. *United States* v. *Sullivan,* 274 U. S. 259 (1927), but it must be conceded that doing so might well focus unwanted attention on him. Moreover, since appellant chose not to register at all, the Government contends that he has no valid claim. Finally, this might well be the type of case in which the privilege would be sufficiently protected by barring any possibly incriminating information in any subsequent prosecution; Judge Dooling in substance accepted this reasoning, but that was before the Supreme Court decisions cited above.

Although some of these considerations are substantial, we conclude that there is a more fundamental reason for rejecting appellant's fifth amendment analysis. A registration statute may create the dilemma whether to incriminate oneself or risk punishment for failure to do so: e.g., whether to register as a communist or a gambler or owner of a firearm or risk prosecution for failing to register, as in *Albertson, Marchetti* or *Haynes.*[4] In these situations, the Supreme Court has applied the privilege to eliminate that

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[3] The regulations provide for referral to a United States Attorney only after the local board fails to convince the registrant to perform his duites. See, e.g., 32 C.F.R. § 1613.16. In other situations a board would presumably rely on the delinquency regulations. See 32 C.F.R. §§ 1642.1-.46. But cf. *Kaohelaulii* v. *United States,* 389 F. 2d 495 (9th Cir. 1968).

[4] Mr. Justice Goldberg referred to the possibility of giving perjured answers, thus converting the "dilemma" into a "trilemma." See *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964).

problem. But that is not the case here. Assuming for discussion only that Toussie might have incriminated himself by registering, let us say, four years late, we think that he did not risk prosecution by failing to do so, at least not in the sense relevant here. That is, his inaction did not give rise to the threat of punishment beyond that he had already risked. The Government has conceded that only one offense is committed by failing to register between the ages of 18 and 26, and its actions have been consistent with its words. Appellant was indicted for and convicted of only one offense—failing to register on his 18th birthday or at any time. By doing nothing—as indeed was his course—Toussie was not being put to a cruel choice that the privilege is designed to avoid. It is true that because of appellant's inaction from age 18 to age 26, the statute of limitations did not start to run, so that the risk of prosecution was in that sense at least not being diminished. That element of the risk, however, attaches to merely continuing to exist at all, having once committed the crime. Certainly, it would be preferable for one in Toussie's position to shorten a limitation period or to insure the beginning of its lapse. But we do not regard the inability to do so without danger of detection as violating his privilege against self-incrimination. Similarly, leaving the jurisdiction may be a ground for tolling of the statute of limitations, *cf.* 18 U.S.C. § 3290, but we would not regard that as an improper infringement on the right to travel. While the concept of compulsion as used in the fifth amendment context has been liberally construed by the Supreme Court,[5] the unpleasant consequence here of doing nothing is not sufficient to fit properly within that term, cf. Friendly, The Fifth Amendment Tomorrow: The Case for

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[5] See, e.g., *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Griffin* v. *California*, 380 U. S. 609 (1965).

Constitutional Change, 37 U. Cin. L. Rev. 671, 675 n. 25, 700 (1968), particularly in view of the importance of the government interest involved. In short, we hold that the fifth amendment did not bar prosecution here.

III.

Appellant's remaining arguments do not require extensive comment. The claim is made that failure to register for reasons of conscience is protected by the first amendment. However, appellant apparently recognizes that the authorities are against him, asking for "a new look by the Federal Courts." Certainly, various courts of appeals have rejected the contention. See, e.g., *United States* v. *Kime,* 188 F. 2d 677 (7th Cir.), cert. denied, 342 U. S. 823 (1951); *Michener* v. *United States,* 184 F. 2d 712 (10th Cir. 1950); *Richter* v. *United States,* 181 F. 2d 591 (9th Cir.), cert. denied, 340 U. S. 892 (1950); *Gara* v. *United States, supra.* And in *United States* v. *Nugent,* 346 U. S. 1 (1953), the Supreme Court emphasized the constitutionality of the statutory treatment afforded conscientious objectors, which required registration, then investigation of the sincerity of alleged religious beliefs and, finally, assignment to non-military alternative service. The Government's ability to carry out this statutory scheme for conscientious objectors clearly depends in large measure on identification of those holding such beliefs. It is true that in theory the sincerity of one who claims that his conscientious beliefs prevented him even from registering could be tested by the trier of fact in a criminal trial, the procedure appellant sought here, but the present procedures of administrative decision and judicial review do not constitute an infringement of the first amendment. While a proper test of a civilized society is the solicitude with which it treats its principled dissenters, under present

doctrine requiring them to register for eventual assignment to non-military alternative service is constitutional.

Appellant's final claims are insubstantial. There was ample evidence before the jury to warrant a finding that he had the requisite mental capacity, despite a history of emotional disturbance. Moreover, the trial court properly charged the jury on this issue under the test of *United States* v. *Freeman*, 357 F. 2d 606 (2d Cir. 1966), and committed no error in its charge or rulings on defendant's requests to charge.

Judgment affirmed.

Appendix B

Memorandum and Order of District Court.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

67 Cr. 183

UNITED STATES OF AMERICA,

against

ROBERT I. TOUSSIE,

Defendant.

67 Cr. 184

UNITED STATES OF AMERICA,

against

SAMUEL R. TOUSSIE,

Defendant.

Appearances:

MICHAEL ROSEN, Esq. (JOSEPH P. HOEY, Esq., United States Attorney, of Counsel) for the Government

JACOB HELLER, Esq. (HENRY G. SINGER, Esq., of Counsel) for the Defendants.

DOOLING, *D.J.*

Each of the defendants has been indicted for wilfully failing to perform a duty required of him by The Universal Military Training and Service Act of 1946 by wilfully

evading and refusing registration by the Selective Service System. Robert Toussie is charged with doing so from June 23, 1959, until February 3, 1967, Samuel Toussie is charged with doing so from May 9, 1952, until February 3, 1967. The indictments were returned on May 4, 1967.

Defendants move to dismiss the indictments on various grounds the most substantial of which is that they are barred by the five year statute of limitations of 18 U.S.C. Sec. 3282; it is argued also that if the statute requiring registration (50 U.S.C. App. Sec. 453) is construed as imposing a continuing duty to register, it is invalid under the Fifth Amendment; it is urged that the indictments rest on evidence procured in violation of the Sixth Amendment in that the defendants' Attorney-client privilege was violated, in violation of their Fifth Amendment right not to incriminate themselves, and in violation of their Fourth Amendment rights to be free of unreasonable searches and seizures. Defendants move also to suppress evidence that has allegedly been illegally seized, for an inspection of the Grand Jury minutes, for a discovery of all inculpatory statements and statements made by their former attorney, and for a bill of particulars.

1. The motion to dismiss the indictments as barred by the five year statute of limitations is granted as to the defendant Samuel R. Toussie and denied as to the defendant Robert I. Toussie.

The offense is a continuing one; the man between eighteen and twenty-six does not discharge his duty by failing to register on the day he attains his eighteenth birthday or within five days thereafter; he continues under a duty to present himself for registration as long as he is liable for service in the armed forces, (cf. 32 C.F.R. Sec. 1611.7 (c)), and he is liable from eighteen years six months, until the twenty-sixth anniversary of his birth (50 U.S.C. App.

Sec. 454(a)). Hence, it can not be doubted since *Fogel* v. *United States*, 5th Cir. 1947, 162 F. 2d 54, and *United States* v. *Guertler*, 2d Cir. 1945, 147 F. 2d 796, 797, that an indictment is timely if found within five years after the last day on which there was a duty to register. The indictment against Robert Toussie is therefor timely if he had not passed the twenty-sixth anniversary of his birth more than five years before the indictment was filed on May 4, 1967. It is inferred that the Government's case is that Robert Toussie was born on June 23, 1941, and attained the age of eighteen on June 23, 1959. If that is so, he attained the age of twenty-six on June 23, 1967 and was still liable to military service and under a duty to register when the indictment was returned.

The situation of Samuel Toussie is different. It is evidently the intention of the Government to show that he was born on May 9, 1934. If so, he became twenty-six on May 9, 1960, and the indictment was not returned against him until nearly seven years after the last day on which he was liable to military service and under a duty to register. *McGregor* v. *United States*, 4th Cir. 1953, 206 F. 2d 583, held on comparable facts that an indictment was timely, relying on the "continuing duty" principle established by the *Fogel* case. However, the Court evidently failed to observe that after Fogel's failure to register the law had been amended to extend the period of liability to service until attainment of 65 years, and men up to 65 had been required to register, so that, when indicted, Fogel had been liable to service and under a duty to register within the limitary period. See *Fogel* v. *United States, supra*, 162 F. 2d at 56, footnote 5 (Citing the change in the law, the Court said, "Attainment of the age of forty-five by Fogel after February 16, 1964, would not, therefore have relieved him of his continuing duty to register."); *cf. United States* v. *Guertler, supra*, 147 F. 2d at 797. There appears to be no

escape from the proposition that the statute of limitations must bar the indictment if, as appears to be the case, it charges a continuing crime that by its nature could not have been committed by Samuel Toussie after May 9, 1960. If the Government intends to prove that Samuel Toussie was born on or after May 4, 1936, then it may move to have the present order set aside.

2. The argument based on the Fifth Amendment is that once a person liable to military service fails to register on time, his later registration is a self-accusatory act which, therefore, he cannot be required to perform. Reliance is placed of course, on *Albertson* v. *Subversive Activities Control Board,* 1965, 382 U. S. 70, and on the now-doubtful status of *United States* v. *Kahriger,* 1952, 345 U. S. 27. The argument is invalid. Whether a man has committed a crime or not, as long as he is liable to military service, he is under a duty to register. His registration may possibly facilitate his prosecution, but it is not required in order to advance that purpose nor, indeed, could the occasion of registration be exploited by the clerk supervising the registration to conduct an essentially criminal investigation by inquiring into the registrant's knowledge of his duty and the motivations of his delinquency. So long as the registration inquiries are relevant to and addressed to the proper business of the Selective Service System, the occasion involves only that bare minimum of self-incrimination flowing from self-identification that is inseparable from any continuance as a member of society. Like an accused's compelled appearance at his trial, where he may be seen, recognized, and condemned by identifying testimony, or an accused person's apperance in a line-up, or a suspect's surrendering a blood sample to be tested for its alcoholic content, the person liable for military service cannot be excused from his compelled presentation of himself and his compelled submission to registration even though adventitiously, and

not purposively, it may facilitate his conviction. See *Michener* v. *United States*, 10th Cir. 1950, 184 F. 2d 712 (registrant cannot present self, give information, and require clerk to complete the forms and effect the registration without the registrant's signing any of the forms). While much is made of the matter semantically, the simple facts are that registration is not *in se* self-accusatory, and that delinquency cannot be suffered to create an exemption from the duty to register if there is—and there is—a power to raise an army, Cf. *United States* v. *Sullivan*, 1927, 274 U. S. 259, 263, 264. Whether, if defendants had registered, their registrations could have been used in evidence against them is a different matter altogether. Cf. *Garrity* v. *New Jersey*, 1967, 385 U. S. 493.

3. Defendants state that, at a request of the Federal Bureau of Investigation made to defendants' former attorney Arthur N. Fields, Esq., both defendants met with Special Agent Corless and another agent in Mr. Fields' office. The defendants were asked whether they had registered, but they only gave their names and addresses in response. Defendants say that on the next day, Friday, February 3, 1967, they were told that warrants had been issued for their arrests, and that "arrangements were made for (them) to voluntarily surrender to the F.B.I." The defendants went together to the F.B.I. office, submitted to arrest, were finger printed, searched and their possessions listed, and then they went to the United States Attorney's office in Brooklyn, and then were taken before the Commissioner. The Commissioner defendants say, declined to release them without requiring bail unless they answered questions about the backgrounds including the schools they had attended, their dates of graduation and how long they had lived at their then present addresses. Defendants say that they saw Special Agent Corless making notes of the

defendants' answers. Both defendants were then released on their own recognizances. (The Assistant United States Attorney had requested that bail be fixed at $50,000 for each defendant).

The affidavit on which the warrant for arrest issued was made by Special Agent Corless; it asserted as grounds for arrest that review of Selective Service records revealed no record of registration by either defendant, and that "an attorney representing" each defendant stated orally "to Selective Service personnel that the defendant has not and would not register for the Selective Service". Each defendant swears that he was "not aware that a conversation had taken place between my attorney and Selective Service personnel" and that "I never authorized or gave permission to Mr. Fields to divulge any such information to the Selective Service or any other Agency of the Government". Both defendants argue that Mr. Fields would not have and, therefore, probably did not make any such statement to the Selective Service personnel.

The Government states, and it is not denied, that defendants were represented by counsel at the time of the arrest, and during the proceedings before the Commissioner. No affidavit by Mr. Fields is presented, and the Government presents no affidavit except that of the Assistant United States Attorney.

It is obvious that the defendants have not registered or the indictments would long since have been dismissed on the Government's motion. And it is equally obvious that the Government needs no more than the name and address of a delinquent to embark on its inquiry and determine the objective facts. Neither the defendants nor the Government have disclosed what initiated the inquiry that led to the indictments.

If the affidavit of Corless, alleging that defendants' attorney had told Selective Service that defendants had not

and would not register, was a correct relation of what he was told (whether or not his informant was correctly reporting what the attorney had said), the affidavit was sufficient to support a warrant of arrest. The statement that a review disclosed the absence of any registration record must be taken as correct in the absence of any showing that there is no means of effective review. The second statement, reciting the alleged statement of the attorney to Selective Service personnel might have been more precise in identifying the personnel, but, given the kind and the circumstances of the case, it sufficed. In the present cases arrest was a prearranged formality, and there is no suggestion that Mr. Fields was ignorant of the content of the affidavit either when the pre-arranged arrest occurred, or when the proceedings before the Commissioner took place.

The statement in Corless's affidavit will not be admissible against defendants at the trial, nor will Corless's testimony about what the Selective Service personnel said. Even the Selective Service personnel will be able to testify to the statement allegedly made by defendants' attorney only if the Government shows that defendants authorized the statement, *Cf. Laird* v. *Air Carrier Engine Service,* 5th Cir. 1959, 263 F. 2d 948, 953; *City of Long Beach* v. *Metcalf,* 9th Cir. 1939, 103 F. 2d 483, 487. The appeal to constitutional considerations is out of place; there is not here any stealthy governmental intrusion into the confidential communications between attorney and client. Contrast *Black* v. *United States,* 1966, 385 U. S. 26; *O'Brien* v. *United States,* 1967, 386 U. S. 345. The question is, remotely and contingently, one over the admissibility of a damaging statement about a fact readily provable in other ways.

While there is uncertainty about the exact extent to which the affidavit underlying a warrant may be challenged after the warrant has been executed where the affidavit, if true, is sufficient to support the warrant, it would appear

that one seeking to challenge the affidavit must at minimum show that the affiant was consciously presenting to the Commissioner an affidavit that the affiant knew was false or should clearly have realized was false. Cf. *United States v. Pearce,* 7th Cir. 1960, 275 F. 2d 318, 321-322. No such showing is made here, but, at most, there are only assertions that defendants' attorney could not have said what he is said to have said, and, if he did, he was not authorized to say it. That rises only a little, if at all, above speculation.

4. The general attack on the affidavit supporting the warrant emphasizes its failure to name the attorney, give the time and place of his statement, describe the nature of the review of the Selective Service records, and disclose the age of the defendant. In other circumstances and in cases of other sorts such criticisms might have force, but the offense charged is utterly simple, and the few words used to describe it and to establish probable cause did so adequately.

5. The attack on the arrest and incident search is not supported by the affidavits. To the extent that defendants wish to keep the point alive as a motion to suppress the use in evidence of anything taken from the defendants during the search, and to support it by testimony, the motion is referred to the Judge to whom the case is assigned for trial.

6. The motion to suppress the information obtained at the proceeding before the Commissioner appears to be devoid of merit. Defendants were represented by counsel, there would have been no difficulty in presenting the point now made to the Commissioner, to the District Court and to the Court of Appeals in rapid succession. The factors

relevant on a bail application are well known, and an inquiry into defendants' roots in the community is automatic on any such application. If the proceeding was perverted from its proper end in order to obtain a discovery of evidence useful in the prosecution and useless in determining whether to require bail and, if so, in what amount, then defendants should have objected at that time and to the Commissioner in the first instance. No coercion or duress is shown that would warrant the exclusion from evidence of the Commissioner's record of defendants' admissions, if any were made. If defendants mean to press the point and support it by testimony, then it is referred to the Judge to whom the case is assigned for trial.

7. The motion to inspect the Grand Jury minutes or dismiss the indictment as based on tainted evidence is denied. No ground for an examination of them is advanced.

8. The motion for discovery is granted to the extent of directing disclosure of the text reporting defendants' statements or their attorney's statements as set forth, whether in direct discourse, paraphrase, summary or otherwise, in any document prepared by Government personnel, without disclosing any other parts of the document except its date and the identity of its author.

9. The motion for particulars is misconceived and is denied except as to item (b) (ii) which is granted in substance.

It is, accordingly,

ORDERED that the indictment in 67 Cr. 184 (the case of Samuel R. Toussie) is dismissed on the ground that the indictment was not found within five years after the twenty-sixth anniversary of the defendant's birth and prosecution was barred by 18 U.S.C. Sec. 3282, and all other motions of Samuel R. Toussie are deemed with-

drawn; and it is, in 67 Cr. 183, the case of Robert I. Toussie,

ORDERED that the motion to suppress the use in evidence of matter taken from defendant during the search on February 3, 1967, and to suppress and exclude the statements taken from defendant during the bail hearing are referred to the Judge to whom the case is assigned for trial for disposition; and it is further

ORDERED that the Government furnish to defendant Robert I. Toussie within twenty days copies of the matter directed to be disclosed in the paragraph numbered "8" above in lieu of permitting defendant to inspect and copy the documents in which the statements are contained; and it is further

ORDERED that the Government furnish to defendant Robert I. Toussie within twenty days the following particularization of the indictment; the places within the Eastern District of New York, and elsewhere, at which defendant failed and neglected to perform a duty required of defendant by the Universal Military Training and Service Act of 1948, the Presidential Proclamations and the Regulations under the Act by evading and refusing registration by the Selective Service System; and it is further

ORDERED that the motions of Robert I. Toussie to dismiss the indictment, to inspect the Grand Jury minutes, and for a hearing under Rule 12(b)(4) are denied.

Brooklyn, New York
August 30, 1967

J. DOOLING
U.S.D.J.

Appendix C

Judgment of United States Court of Appeals.

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May, one thousand nine hundred and sixty-nine.

Present: HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Robert I. Toussie,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix D

Order of United States Court of Appeals Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Appellee,

against

ROBERT I. TOUSSIE,

Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, or in the alternative for an order staying the court's mandate, with the continuance of appellant on his own recognizance.

Upon consideration thereof, it is

Ordered that the petition for rehearing be and it hereby is denied, that the petition for a stay of the court's mandate be and it hereby is granted pursuant to the provisions of Rule 41(b), Federal Rules of Appellate Procedure, and that appellant be continued on his own recognizance, if the provisions of said Rule are complied with, pending the filing and determination of an application for a writ of certiorari.

STERRY R. WATERMAN

.....

Sterry R. Waterman

J. JOSEPH SMITH

.....

J. Joseph Smith

WILFRED FEINBERG

.....

Wilfred Feinberg

June 9, 1969

Circuit Judges.

Appendix E

Order Extending Time to File Petition for Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969

No. .....

ROBERT I. TOUSSIE,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s), IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 8th, 1969.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 23 day of June, 1969.

Appendix F

Constitutional Provisions, Statutes and Regulations.

CONSTITUTION

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

Title 50 U.S.C. App.:

§ 453. Registration

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United

States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

June 24, 1948, c. 625, Title I, § 3, 62 Stat. 605; June 19, 1951, c. 144, Title I, § 1(c), 65 Stat. 76.

§ 454. Persons liable for training and service

(a) Age limits; training in National Security Training Corps; physical and mental fitness; adequate training facilities; assignment to stations and units; training period; medical specialist categories

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States; *Provided,* That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces; *Provided further, That, notwithstanding any other provision of law, any*

*registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted;** *Provided further,* That any male alien who is between the ages of 18 years and 6 months and 26 years, at the time fixed for registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title [said sections] if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

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* Italicized portion added in June, 1967 (81 Stat. 100).

§ 462. Offenses and penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant

thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts martial under laws in force prior to the enactment of this to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Title 18 U.S.C.

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. As amended Sept. 1, 1954, c. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145, renumbered Sept. 26, 1961, Pub. L. 87-299, § 1, 75 Stat. 648.

PRESIDENTIAL PROCLAMATIONS

Proclamation No. 2799

July 20, 1948, 13 F.R. 4173, 62 Stat. 1531

REGISTRATION

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by title I of the Selective Service Act of 1948 [sections 451-470 of this Appendix], do proclaim the following:

1. The registration of male citizens of the United States and other male persons residing in the United States who shall have attained the eighteenth anniversary of the day of their birth and who shall have not attained the twenty-sixth anniversary of the day of their birth shall take place in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands between the hours of 8:00 A.M. and 5:00 P.M. on the day or days hereinafter designated for their registration, as follows:

(a) Persons born in the year 1922 after August 30, 1922, shall be registered on Monday, the 30th day of August, 1948.

(b) Persons born in the year 1923 shall be registered on Tuesday, the 31st day of August, 1948, or on Wednesday, the 1st day of September, 1948.

(c) Persons born in the year 1924 shall be registered on Thursday, the 2nd day of September, 1948, or on Friday, the 3rd day of September, 1948.

(d) Persons born in the year 1925 shall be registered on Saturday, the 4th day of September, 1948, or on Tuesday, the 7th day of September, 1948.

(e) Persons born in the year 1926 shall be registered on Wednesday, the 8th day of September, 1948, or on Thursday, the 9th day of September, 1948.

(f) Persons born in the year 1927 shall be registered on Friday, the 10th day of September, 1948, or on Saturday, the 11th day of September, 1948.

(g) Persons born in the year 1928 shall be registered on Monday, the 13th day of September, 1948, or on Tuesday, the 14th day of September, 1948.

(h) Persons born in the year 1929 shall be registered on Wednesday, the 15th day of September, 1948, or on Thursday, the 16th day of September, 1948.

(i) Persons born in the year 1930 before September 19, 1930, shall be registered on Friday, the 17th day of September, 1948, or on Saturday, the 18th day of September, 1948.

(j) Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter.

2. (a) Every male citizen of the United States and every other male person residing in the United States other than persons excepted by section 6(a) of title I of the Selective Service Act of 1948 [section 456(a) of this Appendix], who is within any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands and who shall have attained the eighteenth anniversary of the day of his birth and who shall have not attained the twenty-sixth anniversary of the day of his birth on the day or any of the days fixed herein for his registration is required to and shall on that day or any of those days present him-

self for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

(b) A person subject to registration may register after the day or days fixed for registration in case he is prevented from registering on that day or any of those days by circumstances beyond his control or because he is not present in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on that day or any of those days. If he is not in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but subsequently enters any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, he shall within five days after such entrance present himself for and submit to registration before a duly designated registration official or selective service local board. If he is in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but because of circumstances beyond his control is unable to present himself for and submit to registration on that day or any of those days he shall do so as soon as possible after the cause for such inability ceases to exist.

3. Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

4. I call upon the Governors of each of the several States, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands and the Board of Commissioners of the District of Columbia, and all officers and agents of the United States and all officers and agents of the several States, the Territories of Alaska and Hawaii, Puerto Rico, the Virgin Islands, and the District of Columbia, and political subdivisions thereof, and all local boards which, and agents thereof who, may be appointed under the provisions of title I of the Selective Service Act of 1948, or the regulations which may be prescribed thereunder, to do and perform all acts and services necessary to accomplish effective and complete registration.

5. In order that there may be full cooperation in carrying into effect the purposes of title I of the Selective Service Act of 1948, I urge all employers and Government agencies of all kinds—Federal, State, territorial and local —to give those under their charge sufficient time in which to fulfill the obligations of registration incumbent upon them under the said Act and this proclamation.

HARRY S. TRUMAN

Proclamation No. 2942

Aug. 30, 1951, 16 F. R. 8969, 65 Stat. c35

REGISTRATION—SUPPLEMENTING PROCLAMATION No. 2799

1. The registration of male citizens of the United States who are required to register by the said Proclamation No. 2799 of July 20, 1948 [set out as a note under this section], shall continue to be accomplished in accordance with the provisions of that proclamation.

2. The registration in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands of male persons who are not citizens of the United States and who are subject to registration under section 3 of title I of the Universal Military Training and Service Act, as amended [this section], shall hereafter be accomplished in accordance with paragraph numbered 3 of this proclamation.

3. (a) The registration of male persons who are not citizens of the United States who shall have attained the eighteenth anniversary of the day of their birth and who shall have not attained the twenty-sixth anniversary of the day of their birth shall take place in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands between the hours of 8:00 A.M. and 5:00 P.M. on the day or days hereinafter designated for their registration as follows:

(1) Every person born on or after September 15, 1925, but not after September 14, 1933, shall be registered on Friday, the 14th day of September, 1951, or on any day within the period of six months following the day on which he entered any of the following: The continental United States, the Territoy of Alaska, the Territory of Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(2) Every person born after September 14, 1933, shall be registered on the day he attains the eighteenth anniversary of the day of his birth, or within five days thereafter, or on any day within the period of six months following the day on which he entered any of the following: The continental United States, the Territory of Alaska,

the Territory of Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(b) Every male person now or hereafter in the United States who is not a citizen of the United States, other than persons excepted by or pursuant to section 6(a) of title I of the Universal Military Training and Service Act, as amended [section 456(a) of this Appendix] and those previously registered pursuant to the said Proclamation No. 2799 of July 20, 1948 [set out as a note under this section], or pursuant to the said Proclamation No. 2938 of August 16, 1951 [set out as a note under this section], who is within any of the several States of the United States, the District of Columbia the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands and who shall have attained the eighteenth anniverary of the day of his birth and who shall have not attained the twenty-sixth anniversary of the day of his birth on the day or any of the days fixed herein for his registration is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

(c) If a person subject to registration who is not a citizen of the United States is in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but because of circumstances beyond his control is unable to present himself for and submit to registration on that day or any of those days he shall do so

as soon as possible after the cause of such inability ceases to exist. If a person subject to registration who is not a citizen of the United States is not in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed herein for the registration of a person of his age but subsequently enters any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, he shall present himself for and submit to registration before a duly designated registration official or selective service local board within the period of six months following the day on which he entered any of the following: The continental United States, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, the Virgin Islands and Guam.

(d) Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

HARRY S. TRUMAN.

REGULATIONS

Title 32 C.F.R.

§ 1611.7 Responsibility for performance of duty.

(a) Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

(b) Every person who, on the day or one of the days fixed for registration, is required to be registered is per-

sonally charged with the duty of presenting himself before the proper officials and submitting to registration.

(c) The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

(d) Persons required to present themselves for and submit to registration shall not be paid for performing such obligation nor shall they be paid travel allowances or expenses.

Part 1613—Registration Procedures

Place and Time

Sec.

1613.1 Place and time of registration.

Manner of Registration

1613.11 Interview of the registrant.
1613.12 Instructions concerning completion of registration card.
1613.13 Registrant's signature.
1613.14 Certification by registrar.
1613.16 Recalcitrants.

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Authority: The provisions of this Part 1613 issued under sec. 10, 62 Stat. 618, as amended; 50 U.S.C. App. 460.

PLACE AND TIME

§ 1613.1 Place and time of registration.

(a) Any person required to be registered may present himself for and submit to registration at any designated place of registration or at the office of any local board during the hours for registration specified in the Presidential proclamation or during the usual business hours.

(b) All persons waiting to register at any place of registration at the closing hour on the day or the last one of the days fixed for their registration by the Presidential proclamation shall be registered.
[13 F. R. 4535, Aug. 6, 1948. Redesigned at 14 F. R. 5021, Aug. 13, 1949]

MANNER OF REGISTRATION

§ 1613.11 Interview of the registrant.

(a) Every registrant before being registered shall enter his name and place of residence upon one of the numbered lines on the Tally Sheet (SSS Form No. 4). If the registrant is unable to write, the registrar shall print the registrant's name and place of residence on the Tally Sheet (SSS Form No. 4). All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card (SSS Form No. 1) except when the registrant signs the completed card.

(b) The space on the Registration Card (SSS Form No. 1) for the selective service number shall be left blank.

(c) The registrar shall obtain from the registrant and by observation of the registrant the information necessary

to complete the entries on the Registration Card (SSS Form No. 1), and shall enter the information in the proper items of the card. The registrar shall make certain that the registrant fully understands what information is required and if any information given by the registrant is not clear the registrar shall carefully explain to the registrant what information is required and request that it be furnished clearly and correctly.

[13 F. R. 4535, Aug. 6, 1948, as amended by 16 F. R. 9030, Sept. 6, 1961, 28 F. R. 7497, July 24, 1963. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.12 Instructions concerning completion of registration card.

(a) The registrar shall take extreme care that the place of residence of the registrant is correctly entered in item 2 of the Registration Card (SSS Form No. 1). The local board having jurisdiction over the place of residence entered in item 2 of the Registration Card (SSS Form No. 1) shall always have jurisdiction over the registrant, unless otherwise directed by the Director of Selective Service. The registrar shall require the registrant to give sufficient information as to the location of the place of his residence to establish such place within the jurisdiction of a local board. The registrant shall not be permitted to give a place of residence outside of the continental United States, the State of Alaska, the State of Hawaii, Puerto Rico, the Virgin Islands, Guam, or the Canal Zone. In describing his place of residence, the registrant shall give the street number thereof, when used, and in every case he shall give the name of the town, township, village, or city, and the county and State in which it is located. No R.F.D. route number shall be

sufficient unless it is supplemented by more particular information showing where the place of residence is located on the R.F.D. route. The registrant shall be permitted to determine what place he desires to give as his residence when he is not located in the same place all of the time.

(b) The registrar shall enter the mailing address of the registrant in item 5 of the Registration Card (SSS Form No. 1) only when it is not the same as the place of residence entered in item 2. It should be made clear to the registrant that he should give as his mailing address an address normally regarded by him as a permanent address at which he would expect to receive important communications. The registrar shall advise the registrant that a correct mailing address is most important because it is the address to which all notices to the registrant will be sent, and that he must advise his local board each time there is a change in his mailing address.

(c) The registrar, in entering the date of birth of the registrant in item 3 of the Registration Card (SSS Form No. 1), shall use the name of the month or an abbreviation thereof. No numerical designation for the month shall be used.

[Amdt. 77, 23 F. R. 4000, June 24, 1958, as amended by Amdt. 84, 24 F. R. 7693, Sept. 24 1959]

§ 1613.13 Registrant's signature.

(a) When the provisions of §§ 1613.11 and 1613.12 have been carried out, the registrar shall have the registrant verify the correctness of the entries on the Registration Card (SSS Form No. 1).

(b) The registrant shall then sign his name, exactly as he usually signs it, in the space on the Registration

Card (SSS Form No. 1) provided for his signature. If he cannot sign his name, he shall make his mark, and the registrar shall then write in after the mark the words "The mark of ....., made
(Name of registrant)
in my presence" and shall sign his own name thereunder, followed by the word "Registrar."

(c) If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card (SSS Form No. 1), and such registrant shall thereby be registered.

[13 F. R. 4535, Aug. 6, 1949. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.14 Certification by registrar.

(a) After the Registration Card (SSS Form No. 1) is signed, the registrar shall note, in the space provided therefor, the registrant's answers which he believes to be incorrect or false, if any. If he does not believe any of the registrant's answers to be incorrect or false, he shall write the word "None" in such space. It is the duty of the registrar to report on the Registration Card (SSS Form No. 1) any answers of the registrant he believes to be incorrect or false.

(b) The registrar shall then sign the certification and fill in the date of registration on the Registration Card (SSS Form No. 1). The registrar should then carefully check the completed Registration Card (SSS Form No. 1)

to be sure that every question is correctly answered and that all the answers are complete and legible.

[13 F. R. 4536, Aug. 6, 1948, as amended by Amdt. 77, 23 F. R. 4600, June 24, 1958. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.16 Recalcitrants.

If a registrant refuses to cooperate or is inclined to evade, refuses to answer, or answer falsely, his attention should be called to the penal provisions of title I of the Military Selective Service Act of 1967. If he is still refractory, witnesses should be called and, after the penalty of the law has been explained again to him in the presence and hearing of witnesses, a full opportunity should be given him to reconsider his actions and answer the questions. If he is still refractory, his name and the names of the witnesses should be noted and the case immediately reported to the United States district attorney. The registration should not be obstructed or delayed. Persons attempting to obstruct or delay it should be dealt with promptly and firmly.

[Amdt. 28, 16 F. R. 9030, Sept. 6, 1951, as amended by E. O. 11360, 32 F. R. 9787, July 4, 1967]

§ 1642.3 Compliance with procedures of this part not condition precedent to prosecution.

Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part is not a condition precedent to the prosecution of any person under the provisions of section 12 of title I of the Military Selective Service Act of 1967.

[E. O. 10292, 16 F. R. 9862, Sept. 28, 1951; E. O. 11360, 32 F. R. 9788, July 4, 1967]

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 441

ROBERT I. TOUSSIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 410 F. 2d 1156. The opinion of the district court (Pet. App. 12-21) is reported at 280 F. Supp. 473.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969. A petition for rehearing was denied on June 9, 1969 (Pet. App. 23). Mr. Justice

Harlan extended the time for filing a petition for a writ of certiorari to August 8, 1969 (Pet. App. 24), and the petition was filed on August 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether failure to register with the Selective Service System is a continuing offense, for purposes of the statute of limitations, until the time an individual reaches the age of twenty-six.

2. Whether, after an initial failure to register, registration could not subsequently have been required because such late registration may have been self-incriminatory.

3. Whether the trial court erred in declining to instruct that conscientious objection may be a defense to a charge of failure to register.

STATUTE AND REGULATION INVOLVED

Section 3 of the Universal Military Training and Service Act, 62 Stat. 605, as amended, 65 Stat. 76 (50 U.S.C. App. 453), provides:

> Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be deter-

mined by proclamation of the President and by rules and regulations prescribed hereunder.

32 C.F.R. 1611.7(c) provides:

> The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of knowingly and wilfully evading and refusing registration with the Selective Service System, in violation of 50 U.S.C. App. 462(a). On November 29, 1968, he was committed to the custody of the Attorney General pursuant to 18 U.S.C. 4208(b), with sentencing stayed pending appeal.

The evidence is undisputed that petitioner not only did not register for the draft in 1959, on attainment of his eighteenth birthday, but that he never registered thereafter (1 R. 87, 138, 140; 2 R. 280, 310).[1] In 1967, almost eight years later, he was arrested as a Selective Service law violator (1 R. 151), and the instant prosecution ensued.

Before trial petitioner claimed that since his initial failure to register had occurred in 1959, his

[1] "R." preceded by the volume number refers to the four-volume trial transcript on file with the Clerk of this Court.

1967 indictment and trial were barred by the running of the applicable five-year statute of limitations contained in 18 U.S.C. 3282. The district court denied the motion. The court determined that petitioner's offense in failing to register was a continuing one under the statute and the pertinent regulations, and that petitioner had remained under a duty to present himself for registration as long as he was liable for training and service in the Armed Forces, or until he reached age twenty-six (see 50 U.S.C. App. 454(a)), when the statute of limitations would have commenced to run (Pet. App. 13-14).[2]

At trial petitioner claimed to be a conscientious objector whose scruples would not permit him to "even take the first step of registration" (2 R. 310-312; 3 R. 432; 437), and caused him to oppose as well the performance of civilian work in lieu of military service as is required of those classified I-O (3 R. 443). The trial court instructed the jury that petitioner's motive, idealism and philosophy were immaterial, except as aids in determining intent and mental capacity (2 R. 233-234; 4 R. 589-590). However, it refused to charge, as requested by petitioner, that he was entitled to acquittal if his failure to register was found to be based on religious beliefs or moral scruples (see Pet. 24).

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[2] Petitioner was arrested with his thirty-three year old brother and both were charged with failing to register. The district court ruled, as to the brother, that the statute of limitations had run as more than five years had elapsed since his obligation to register had terminated at age twenty-six (Pet. App. 14-15), and the government acquiesced in that holding. Petitioner, however, was born on June 23, 1941, and thus was not yet twenty-six when he was indicted on May 4, 1967.

ARGUMENT

1. Petitioner argues that the offense defined by the statute (50 U.S.C. App. 453) was complete when he failed to register shortly after his eighteenth birthday; that the regulation (32 C.F.R. 1611.7(c)) imposing a continuing duty to register is beyond the scope of the statute; and hence that this prosecution was barred by the five-year statute of limitations. Petitioner does not dispute that, if the duty to register is a continuing one until age twenty-six, and can validly be made so consistent with the First and Fifth Amendments, the prosecution is not barred and he was properly convicted.

Whether an offense is a continuing one involves interpretation of congressional intent (see *Pendergast* v. *United States*, 317 U.S. 412, 420), similar in character to the determination of the "unit" of an offense (see *United States* v. *Universal Corp.* 344 U.S. 218, 224) or the extra-territorial application of the pertinent statute (see *United States* v. *Bowman*, 260 U.S. 94). While of course Congress may make explicit its desire that an offense should be deemed a continuing one, an express statement to that effect is not the only way in which such intent may be manifested. Courts have looked both to the nature of the conduct sought to be proscribed and the purpose of the statute to determine whether the offense defined is a continuing one. See *Bramblett* v. *United States*, 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015; *United States* v. *Franklin*, 188 F. 2d 182 (C.A. 7). The purpose of registration within the Se-

lective Service System is to provide a basis for the classification and mobilization of manpower for military service. *E.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 377. A deliberate failure to register necessarily has a continuing effect on the efficient operation of the Selective Service System, for it reduces the pool of manpower known to be available for training and service. Even without the specific regulation, then, the offense of failure to register as required by Section 3 of the Act should be deemed a continuing offense,[3] at least, as in the situation here, for the period between ages eighteen and twenty-six when the individual would be liable for training and service. Thus, the regulation which spells out the continuing duty, contrary to petitioner's claim, is not in conflict with the statute. It accordingly does not involve any executive usurpation of legislative authority. Rather, it simply serves to give notice to all individuals of their continuing duty under the statute to register.[4] The decision of the court below that the prosecution was not barred by the statute of limitations is thus correct and in accord with the deci-

---

[3] See *United States* v. *Franklin*, 188 F. 2d 182 (C.A. 2), holding failure to register under the Alien Registration Act to be a continuing offense.

[4] As the court of appeals pointed out, in discussing petitioner's Fifth Amendment contention, "many initial failures to register may be due to such innocent reasons as illness, ignorance, or inability to get to a local board" (Pet. App. 8). It is only the knowing and wilful failure to register that provides the predicate for criminal prosecution. As the court below further noted, "the aim is to get qualified registrants—even delinquent ones—into the armed forces rather than into jail" (*ibid.*).

sions of other circuits which have had occasion to consider the issue. *Fogel* v. *United States*, 162 F. 2d 54 (C.A. 5), certiorari denied, 332 U.S. 791; *McGregor* v. *United States*, 206 F. 2d 583 (C.A. 4); see *United States* v. *Guertler*, 147 F. 2d 796 (C.A. 2); *Gara* v. *United States*, 178 F. 2d 38 (C.A. 6), affirmed on another point by an equally divided court, 340 U.S. 857.[5]

2. Petitioner contends that, even if he was under a continuing duty to register, he cannot be prosecuted for breach of that duty because any registration after his initial failure to do so would have been self-incriminatory. While having some superficial plausibility, this argument, if accepted, would extend *Marchetti* v. *United States*, 390 U.S. 39, and the related cases on which petitioner relies (see Pet. App. 7) far beyond their underlying purpose and rationale. The vice which this Court found in the registration requirements involved in the *Marchetti* line of cases is that the *initial* registration might well serve to incriminate the registrant with respect to some other crimes. That, obviously, is not the situation as regards registration with the Selective Service System. The statute as such thus does not compel incrimination. The mere fact that a late registration might reveal a prior breach of duty thus cannot con-

[5] At all events, 18 U.S.C. 3282 begins with the phrase "[e]xcept as otherwise expressly provided by law." In view of this language, the court below concluded that "even if construed as an extension or a tolling of the statute of limitations to five years after age 26, the continuing duty regulation is an express provision of 'law'" (Pet. App. 5-6).

vert the general registration requirement into a provision violative of the Fifth Amendment. As the court below pointed out (Pet. App. 9), since only one offense—albeit a continuing one—is committed by failure to register, the individual is "not being put to a cruel choice that the privilege is designed to avoid." A person could not excuse his failure to pay income tax for a particular year on the ground that payment might disclose that he had failed to file a return the prior year—a separate crime. Similarly, here, since the act of registration is not incriminatory, petitioner's initial failure to register cannot serve to absolve him of his continuing duty to do so; nor can that failure be excused by invocation of the Fifth Amendment.

3. Finally, petitioner urges that the jury should have been instructed to acquit if it found that he had a conscientious, religiously motivated view that registration for the draft was immoral (Pet. 24). The trial court properly declined so to instruct. There is no absolute right to exemption from military service because of religious or moral beliefs, however conscientious. *Tyrrell* v. *United States*, 200 F. 2d 8 (C.A. 9), certiorari denied, 345 U.S. 910; *Van Bibber* v. *United States*, 151 F. 2d 444, 446-447 (C.A. 8). And certainly the mere requirement of registration does not violate any constitutional right of religious freedom. *Richter* v. *United States*, 181 F. 2d 591 (C.A. 9), certiorari denied, 340 U.S. 892. Since sincerity of belief does not excuse a knowing and wilful breach of a statutory duty, it is simply not a question for a

jury to determine. *Loewing* v. *United States*, 392 F. 2d 218 (C.A. 10); *O'Moore* v. *United States*, 370 F. 2d 916 (C.A. 5); *Tyrrell* v. *United States*, *supra*, 200 F. 2d 8 (C.A. 9), certiorari denied, 345 U.S. 910; see *Walker* v. *City of Birmingham*, 388 U.S. 307, 320-321. In short, the jury was adequately charged regarding the pertinent law.

CONCLUSION

For the following reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

SEPTEMBER 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

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Petitioner,

against

UNITED STATES OF AMERICA,

on Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF PETITIONER

MURRAY I. GURFEIN,
Attorney for Petitioner,
655 Madison Avenue,
New York, N. Y.

JACOB W. HELLER,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement of the Case	3
Summary of Argument	7
ARGUMENT:	
POINT I—The offense charged was time-barred by the five year limitation period prescribed by 18 U.S.C. § 3282; any other construction is constitutionally invalid as an executive usurpation of legislative power	11
A. The five year general statute of limitations (18 U.S.C. § 3282) governs the case at bar	11
B. The Regulations as construed are an unconstitutional invasion of legislative power	19
POINT II—The fifth amendment precludes application of the continuing duty theory to the act of registration	24
POINT III—Petitioner was entitled under the First Amendment to have the jury pass on the sincerity of his conscientious beliefs which prevented him from registering	33
Conclusion	46
Appendix to Brief	
Constitutional Provisions, Statutes and Regulations	A1

Cases Cited

PAGE

Abington School District v. Schempp, 374 U. S. 203 (1963) 37, 38

A. L. A. Schechter Poultry Corp. v. U. S., 295 U. S. 495 (1935) 21

Albertson v. Subversive Activities Control Board, 382 U. S. 70 (1965) 2, 9, 25, 26, 27, 28, 29, 30, 31

Arizona v. California, 283 U. S. 423 (1931) 29

Bates v. Little Rock, 361 U. S. 516 (1960) 40

Bolling v. Sharpe, 347 U. S. 497 (1954) 10, 45

Bridges v. U. S., 346 U. S. 209 (1953) 14

Brown v. Walker, 161 U. S. 591 (1896) 32

Cannon v. U. S., 181 F. 2d 354 (9th Cir. 1950) 30

Cleveland v U. S., 329 U. S 14 (1946) 39

Crowell v. Benson, 285 U. S. 22 (1932) 24, 43

Davis v. Beason, 133 U. S. 333 (1890) 39

Etcheverry v. U. S., 320 F. 2d 873 (9th Cir. 1963) ... 36

Fiswick v. U. S., 329 U. S. 211 (1946) 14

Flemister v. U. S., 260 F. 2d 513 (5th Cir. 1958) 22

Fogel v. U. S., 162 F. 2d 54 (1947) 15, 19

Gara v. U. S., 178 F. 2d 38, 40 [6th Cir.], affd. 340 U. S. 857 (1950) 16, 19

Girouard v. U. S., 328 U. S. 61 (1946) .. 10, 35, 36, 39, 43, 46

Griswold v. Connecticut, 381 U. S. 479 (1965) 40

Grosso v. U. S., 390 U. S. 62 (1968) 2, 7, 9, 25, 27

Grunewald v. U. S., 353 U. S. 391 (1957) 14, 30

PAGE

Hamilton v. Regents, 293 U. S. 245 (1934) 37
Haynes v. U. S., 390 U. S. 85 (1968) 2, 7, 9, 25, 26, 27, 30, 32
In re Summers, 325 U. S. 561, 572 (1945) 38
Jacobson v. Mass., 197 U. S. 11 (1905) 39
Kaohelauli v. U. S., 389 F. 2d 495 (9th Cir. 1968) 31
Krulewitch v. U. S., 336 U. S. 440 (1949) 14
Leary v. U. S., 395 U. S. 6 (1969) 2, 9, 21, 25
Marchetti v. U. S., 390 U. S. 39 (1968) 2, 7, 9, 25, 26, 27, 31, 32
McCray v. U. S., 195 U. S. 27 (1904) 29
McGregor v. U. S., 206 F. 2d 583 (4th Cir. 1953) 16, 19
McKart v. U. S., 395 U. S. 185 (1969) 13
Meyers v. U. S., 272 U. S. 52 (1926) 22
Michener v. U. S., 184 F. 2d 712 (10th Cir. 1950) 30, 36
Mormon Church v. U. S., 136 U. S. 1 (1890) 39
Panama Refining Co. v. Ryan, 293 U. S. 388 (1935) 21
Pendergast v. U. S., 317 U. S. 412 (1943) 13, 15
People v. Hines, 284 N. Y. 93 (1940) 22
Prince v. Mass., 321 U. S. 158 (1944) 39
Richter v. U. S., 181 F. 2d 591 (9th Cir. 1950) 30, 36
Russell v. U. S., 306 F. 2d 402 (9th Cir. 1962) 29
Ryan v. Carter, 93 U. S. 78 14
Schneider v. Rusk, 377 U. S. 163 (1964) 10, 45

PAGE

Shapiro v. Thompson, 394 U. S. 618 (1969) 10, 45

Sherbert v. Verner, 374 U. S. 398 (1963) 10, 36, 38, 41, 42, 43, 45, 46

Speiser v. Randall, 357 U. S. 513 (1958) 10, 46

Ullman v U. S., 350 U. S. 422 (1956) 32

U. S. v. Barber, 219 U. S. 72 (1911) 22

U. S. v. Bendik, 220 F. 2d 249 (2d Cir. 1955) 18

U. S. v. Covington, 395 U. S 57 (1969) 33

U. S. v. Dickson, 15 Pet. 141 14

U. S. v. Guertler, 147 F. 2d 796 (2d Cir. 1945) 19

U. S. v. Habig, 390 U. S. 222 (1968) 14

U. S. v. Henderson, 180 F. 2d 711 (7th Cir. 1950) 30

U. S. v. Kime, 188 F. 2d 677 (7th Cir. 1951) 36

U. S. v. Kissinger, 250 F. 2d 940 (3rd Cir. 1958) 36

U. S. v. MacIntosh, 283 U. S. 605 (1931) ..35, 38, 41, 43, 46

U. S. v. McElvain, 272 U. S. 633 (1926) 14

U. S. v. Nugent, 346 U. S. 1 (1953) 10, 36, 40, 43, 44

U. S. v. O'Brien, 391 U. S. 367 (1968) 29

U. S. v. Oppenheimer, 242 U. S. 85 (1916) 22

United States v. Robel, 389 U. S. 258 (1957) 42

U. S. v. Rosenson, 291 F. Supp. 874 (E. D. La. 1968) 25

U. S. v. Rumely, 345 U. S. 41 (1953) 24

U. S. v. Sanchez, 340 U. S. 42 (1950) 29

U. S. v. Sanchez, 340 U. S. 42 (1950) 29

PAGE

U. S. v. Scharton, 285 U. S. 518 (1932) 14

U. S. v. Schwimmer, 279 U. S. 644 (1929) 35, 38

U. S. v. Seeger, 326 F. 2d 846 (2d Cir. 1964), affd. — U. S. — 37, 45

U. S. v. Sullivan, 274 U. S. 259 (1927) 30

Warren v. U. S., 199 Fed. 753 (5th Cir. 1912) 13

West Virginia Board of Education v. Barnett, 319 U. S. 624 (1943) 38

White v. U. S., 216 F. 2d 1 (5th Cir. 1954) 22

Youngstown v. Sawyer, 343 U. S. 579 (1952) 21

UNITED STATES CONSTITUTION

First Amendment 2, 10, 11, 34, 35, 36, 39, 43, 45

Fifth Amendment 2, 9, 11, 33

Ninth Amendment 40

Fourteenth Amendment 11

STATUTES

18 U.S.C.

§ 581-3 20

§ 791 15

§ 792 15

§ 793 15

§ 794 15

§ 3282 .....2, 7, 8, 9, 11, 13, 15, 21

§ 3291 16

§ 4208(b) 3

PAGE

26 U.S.C

§ 4741 29
§ 4752 29
§ 4771-4775 29
§ 6513 15
§ 6531 ..... 15, 21

28 U.S.C.

§ 1254(1) 1

50 U.S.C.

§ 783(a) 26
§ 793(e) 16

50 U.S.C. App.

§ 451 2
§ 453 ..... 2, 8, 11, 13, 23
§ 454 ..... 2, 13, 24
§ 462(a) 3, 11, 27

Act of April 30, 1790, Ch. 9 § 32, 1 Stat. 119 20
Alien Registration Act of 1940 15
9 Halsbury Statutes of England 82 20
Military Selective Service Act of 1967 27
Subversive Activities Control Act 64 Stat. 991 26
The Treason Act, 1695 (7 and 8, Will. Ill. c. 3) 20

REGULATIONS AND PRESIDENTIAL PROCLAMATIONS

Selective Service Regulations (32 C.F.R.)

§ 1611.7 2
§ 1611.7(c) 2, 7, 8, 12

PAGE

§ 1611.7(e) 24
§ 1613.1-16 .....2, 24, 27
§ 1642.3 2

Presidential Proclamations

No. 2799 .....11, 18
No. 2942 .....11, 18

AUTHORITIES

ALI Model Penal Code, Tentative Draft No. 5 § 1.07(4) 15, 20

11 Arizona L. Rev. 249 (1969) 38, 40

Charter and Laws of the Province of Pa. 1682-1700 George, Neod and McComant (1879)) 20

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Mansfield, 1966, Supreme Court Review 33

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Report of the National Advisory Commission on Selective Service (1967) 39

102 Univ. of Pa. L. Rev. 630 (1954) 20

Whitmore, Colonial Laws of Mass. 163 (1889) 20

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BRIEF ON BEHALF OF PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (A. 299-309) is reported at 410 F. 2d 1156. The opinion of the District Court for the Eastern District of New York (A. 37-47) is reported in part at 280 F. Supp. 473.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1969 (A. 310). The petition for a writ of certiorari was filed on August 7, 1969 and was granted on October 20, 1969 (A. 311). This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

Statutes Involved

The pertinent provisions of the Constitution (First, Fifth and Ninth Amendments), statutes (50 U.S.C. App. §§ 453, 454(a) and 462(a); 18 U.S.C. § 3282), Executive Orders (Nos. 2799 and 2942), and Selective Service Regulations (32 C.F.R. §§ 1611.7, 1613.1-16, 1642.3), are all printed in the Appendix annexed to this brief.

Questions Presented

1. Whether Congress intended the offense of failing to register for selective service to be outside the provisions of the general five-year statute of limitations (18 U.S.C. § 3282), which covers all non-capital offenses "Except as otherwise expressly provided by law."?

2. Whether the Universal Military Training and Service Act (50 U.S.C. App. §§ 451 *et seq.*) constitutionally empowers the executive branch to promulgate a regulation, that, despite Congressional silence on the subject, makes registration a continuing duty?

3. Whether a pattern of legislation has been created by the Universal Military Training and Service Act and Selective Service Regulation (32 C.F.R. § 1611.7[c]), prescribing a continuing duty to register, which compels a delinquent registrant to inculpate himself as to his initial failure to register, in violation of his rights under the Fifth Amendment as construed in *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965), *Marchetti* v. *U. S.*, 390 U. S. 39 (1968), *Grosso* v. *U. S.*, 390 U. S. 62 (1968), *Haynes* v. *U. S.*, 390 U. S. 85 (1968), and *Leary* v. *U. S.*, 395 U. S. 6 (1969)?

4. Whether a religious conscientious objector can be denied the right under the First Amendment and Fifth Amendment to have a jury pass on the sincerity of his belief that he could not register for the draft for religious reasons of conscience?

Statement of the Case

Petitioner was convicted in the United States District Court for the Eastern District of New York, upon a jury verdict, of having failed to register for the draft in violation of 50 U.S.C. App. § 462(a). He was sentenced pursuant to 18 U.S.C. § 4208(b), being committed to the custody of the Attorney General for study and report. The indictment charged in one count that the crime was committed over the course of an eight-year period from June 23, 1959 (the date of petitioner's eighteenth birthday [A. 66]) through February 3, 1967, "both dates being approximate and inclusive" (A. 5).

Petitioner admittedly never registered for the draft on his eighteenth birthday or at any time thereafter. He could not do so for reasons of conscience. Petitioner testified: "I couldn't. My conscience wouldn't permit me to. Everything I believed in wouldn't permit me to" (A. 177). It is to be noted that he reached the age of 18 in 1959—well before commencement of the Vietnamese conflict. Even absent such hostilities, however, registration was connotive of "the State—want[ing] me to become a party to killings * * *. It wanted me to become a part of the system that—that murders, and kills and—and it was against everything that I had learned, against my beliefs * * *." (A. 178)

The trial was devoted in substantial degree to presentation of petitioner's conscientious beliefs and their development, although the trial court did not permit the issue to be passed upon by the jury. It was abundantly shown on the basis of petitioner's testimony that his convictions were sincerely held, being the product of upbringing and rooted in family tradition and having been formulated and publicly announced by petitioner years before the statutorily mandated time of registration for the draft.

Petitioner and his family are Syrian Jews—a group described as extremely pacifistic (A. 160). His grandfather

left his place of birth to avoid participation in war and the maiming of others (A. 158). At home, he was submitted to family indoctrination (A. 157-158)—a preachment of "peace and non-violence and serenity and just love of people" (A. 158).

Petitioner commenced the study of pacifistic literature at the age of eleven (A. 154). He cited such writers as Einstein, Freud, Russell, Sir John Slessor, Lord Adrian, Jaubert, among others (A. 151-155), and their expressions of general abhorrence to war, which served to impress him.

Petitioner's views on the subject, fully crystallized by the *age of fourteen,* are best illustrated by his own writing at the time, admitted in evidence as Exhibit B. Petitioner had been selected as the valedictorian for his graduating class at Seth Low Junior High School in Brooklyn (A. 131-132). Significant excerpts from the speech which he prepared for that occasion were read into the record, as follows (A. 149-151):

> "So there you are and here we are, a new generation soon to occupy the center of the stage.
>
> I hope and believe that our generation has been selected by fate to play an earth-shaking role in history. Our generation is going to abolish war from the earth, just as a previous generation abolished small pox and diptheria and the present generation is abolishing polio. And we are going to abolish war, not because we are more ethical than previous generations or more moral or more intelligent, but in the words of President Eisenhower, I quote from his speech of October 19, 1954, 'Since the advent of nuclear weapons it seems clear to me that there is no longer any alternative to peace.'
>
> Let us ponder that for a moment. President Eisenhower, one of the greatest generals of all times, says 'there is no longer any alternative to peace.'
>
> War has always been brutal, vicious and cruel and immoral and destroyed in days what took years to

build. It orphaned children and blinded babies. It starved widows and burned infants alive in the cribs. But to primitive peoples, at least it made sense. You kill off your opponent and grab their lands.

But the recent past wars have become senseless. There is no longer a victor in modern war. To defeat the aggression of Japan we sacrificed the lives of hundreds of thousands of the flower of our manhood, and then we saddle ourself with the intolerable burden of rebuilding Japan and helping to support the Japanese for the rest of our lives and the lives of our children and the lives of our grandchildren.

And still our conscience continues to torture us, so a few weeks ago we bring twenty-five girls who have been disfigured by the atom bomb and Hiroshima. We bring them to New York for plastic surgery. Yes, forget the cruelty. Wars have been senseless for many years. And now with the advent of the H bomb, wars threaten the human race with extinction. If any disease—say pneumonia or scarlet fever were suddenly to take such a virulent form, as to threaten the human race with extinction, a way would be found to conquer it.

And now that war has taken such a virulent form, we are going to find a way to conquer it.

As General Douglas MacArthur told the American Legion in his speech on January 26th of this year, and I quote, 'The next great advance in the evolution of civilization cannot take place until war is abolished.'

Some may say, 'Oh, man has always been an aggressive creature and there'll always be wars.'

I say, 'Yes, there'll always be wars.' There's the war against cancer. There's the war against injustice everywhere. There's the war against bitter poverty that makes fully two-thirds of the population hungry for bread right now. There's the war against heart disease, and there's that beautiful, wonderful war

> against bigotry. I hope to live a hundred years and to take part in those wars until the day I die."

These views caused petitioner to forfeit the honor of delivering the valedictory address, however. His speech was rejected by the teacher in charge, and he refused to alter its text or his opinions, as reflected therein (A. 147).

It appeared that petitioner had not joined any conscientious objector organizations. This entire matter was intensely personal to him—just between "his conscience and the Almighty" (A. 157). He explained that his beliefs would not permit him to be party to anything touching on the destruction of human lives. These laws of God, to him, came first, above the laws of country (A. 157, 180). To quote petitioner (A. 160):

> "I love my country. It's just—I can't have anything to do with—I can't be a part of anything that has to do with the destruction of human life or of other people's rights or somebody else's family, somebody else's child."

Petitioner further testified that, in his view, the act of registration was an inextricable part of the military process. He believed that registration constituted acquiescence therein and he could not bring himself to do so (A. 155-156, 242).

The evidence also showed that these views of petitioner coalesced with factors of an emotional and psychological nature to prevent him from registering. Medical and psychiatric testimony was offered and it was urged on the basis thereof that petitioner also lacked capacity to formulate the requisite criminal intent for commission of the crime charged. In this connection Drs. Dunkell (A. 113-122, 185-214) and Baruch (A. 165-173) testified on petitioner's behalf and Dr. Falsey, who rendered inconsistent views, testified for the Government (A. 252-265).

Petitioner moved before trial to dismiss the indictment on the grounds that it was time-barred under the five-year general limitation provision of 18 U.S.C. § 3282 and constitutionally defectiv in violation of the Fifth Amendment (A. 6-36). The District Court (Dooling, J.) prior to the decisions by this Court in *Marchetti, Grosso* and *Haynes,* denied the motion. The said motions were renewed during the course of trial and, together with the other relevant motions made on petitioner's behalf, were also denied (Mishler, J.).

A companion motion to dismiss an indictment involving petitioner's brother was simultaneously made and granted by Judge Dooling on the ground that the said prosecution was time-barred because the brother had been twenty-six years old for more than five years (A. 38-40). The Government took a direct appeal to this Court from the said order of dismissal. On review by the Solicitor General, however, that appeal was withdrawn.

Summary of Argument

I

We urge that the five-year general statute of limitations (18 U.S.C. § 3282) commenced running on petitioner's eighteenth birthday and bars the instant prosecution. This result is dictated by the plain language of the general limitation statute and the relevant provisions of the Universal Military Training and Service Act, which has no separate or different limitations period. The Court below, without a statutory basis, relied upon a selective service regulation (32 C.F.R. § 1611.7[c]), imposing a "continuing duty" to register beyond age eighteen; thus, "for all practical purposes" (A. 302) extending the five-year statute. It permitted a regulation of the Executive branch to extend the scope of a crime beyond the limits of its statutory definition and to render the legislatively prescribed limitation period meaningless. It also permitted the exception

"by law" in the general statute of limitations (18 U.S.C. § 3282) to mean a regulation (32 C.F.R. § 1611.7[c]) rather than its historic connotation of a statute. The exception provision of the general statute of limitations must be strictly construed. The Congressional exceptions in this area have been by legislative enactment.

The regulation, as construed, permits an unconstitutional usurpation by the Executive of legislative prerogatives. The timeliness of a prosecution is an essential element of the offense. There is no evidence of a legislative intent to treat offenses under the draft law different from other offenses covered by the general statute of limitations.

The sole exception to the foregoing—which lends substantial support to our position—may be found in the 1967 amendment (81 Stat. 100) to 50 U.S.C. § 454 (the provision of the Draft Law pertaining to *induction* and service in the armed forces—as distinguished from § 453, here at issue, which deals with registration). Congress there expressly contemplated a continuing duty by providing that any registrant who failed or refused to report for induction "shall continue to remain liable for induction • • •." This expression of legislative intent is especially significant when contrasted with the total absence of a like legislative direction with respect to registration under § 453.

The Court below, while adopting the continuing duty theory as to registration, held that the duty to do so, and hence the crime, continued only to age 26. This theory, too, is without warrant in the statute and represents an untenable compromise.

The force of petitioner's contentions on the statute of limitation issue and the difficulties inherent in the statutory scheme, led the Court below to conclude that

> "It may be that application of the statute of limitations to this area deserves particularized congressional attention, with a statute, rather than regulations, stating the applicable limitation periods." (A. 304)

We contend that Congress has already passed such a statute (18 U.S.C. § 3282), which there is no valid reason to ignore. In any event, the statute and proclamation clearly prescribe a duty to register *on the day* the registrant attains his eighteenth birthday or within five days thereafter.

II

If the offense is not construed to be a continuing one, the constitutional question hereinbelow presented need not be decided. The continuing duty theory, however, runs afoul of the Fifth Amendment. We maintain that if the statute and regulation imposed upon the petitioner a continuing *duty* to register, despite his initial failure to register at age eighteen, such compulsion to register thereafter compels self-incrimination in violation of the Fifth Amendment. For the registration itself would expose the delinquent registrant to prosecution for his failure to register on time. Application of the Fifth Amendment is mandated under the decisions of this Court in *Albertson, Marchetti, Grosso, Haynes and Leary, supra.* All relevant tests propounded by those decisions have been satisfied here. In particular, since registration in accordance with the regulations could not be accomplished without divulgence by the registrant of his date of birth, among other things, a "real and appreciable" hazard of incrimination as to the prior failure to register (which would be automatically divulged thereby) is created.

By means of the continuing duty theory a strange concept has been introduced to Federal criminal jurisprudence which should not be permitted to stand. A continuing crime has been fashioned where the defendant must *confess* guilt in order to terminate its continuance and start the statute of limitations running. Such a requirement is inimical to the Fifth Amendment and subversive of the legislative policy reflected in statutes of limitation.

III

The final issue presented relates to the First Amendment and its application to one's conscientious beliefs.

1. We maintain that consistent with this Court's decisions in *Girouard* v. *U. S.*, 328 U. S. 61 (1946) and *Sherbert* v. *Verner*, 374 U. S. 398 (1963), a defendant is constitutionally entitled to have the jury pass upon the sincerity of his conscientious beliefs and to acquit if it finds that the failure to register was a result thereof. *U. S.* v. *Nugent*, 346 U. S. 1. (1953), relied upon by the Court below (A. 308), did not treat with the issue. The trial judge refused to submit this question to the jury.

Conscientious objection as a constitutional right is not foreclosed by history. Under the test of *Sherbert* v. *Verner*, *supra*, the Government cannot meet the stringent test of demonstrating that there are no alternatives to infringing First Amendment rights in Selective Service. On a balancing of interests, the rights of a relatively few conscientious dissenters to the process of registration should be respected because of the infinitesimal effect of their dissent upon the process of raising an army. The only forum available to vindicate the constitutional right is the Federal Court in the criminal prosecution.

2. Even if the right of a conscientious objector to exemption is not a constitutional right, in the full sense, discriminatory action toward a privilege within the area of the "free exercise" clause of the First Amendment is unconstitutional (*Speiser* v. *Randall*, 357 U. S. 513 [1958]). This Court has extended prohibitions against discrimination to the due process clause of the Fifth Amendment (*Bolling* v. *Sharpe*, 347 U. S. 497, 499 [1954]; *Schneider* v. *Rusk*, 377 U. S. 163, 168 [1964]; *Shapiro* v. *Thompson*, 394 U. S. 618, 641-2 [1969]).

Even though the Court in *Sherbert* v. *Verner*, *supra*, did not specifically pass on the "equal protection" argument

under the Fourteenth Amendment, it found the fact of discrimination to be relevant in assessing a "free exercise" privilege under the First Amendment (374 U. S. at p. 406).

To permit judicial review of the sincerity of one's conscientious beliefs when one has registered and to deny any judicial determination whatever to one who does not register *as a matter of conscience* is to discriminate between two types of conscientious objectors, equally sincere. Such discrimination is violative of the First Amendment as well as the Fifth Amendment.

ARGUMENT

POINT I

The offense charged was time-barred by the five year limitation period prescribed by 18 U.S.C. § 3282; any other construction is constitutionally invalid as an executive usurpation of legislative power.

A. The five year general statute of limitations (18 U.S.C. § 3282) governs the case at bar.

The relevant statutory provisions giving rise to the crime here charged are 50 U.S.C. App. § 453 (establishing the duty to register) and § 462 (prescribing penalties for violation of the act). Presidential Proclamations No. 2799 and No. 2942 set forth the specific dates for registration, providing in respect of petitioner that he register on his eighteenth birthday or within five days thereafter (Pres. Proc. No. 2799 subd. [j]).

The general statute of limitations (18 U.S.C. § 3282) provides that a person may not be prosecuted, tried or punished for an offense unless indicted within five years next after its commission "Except as otherwise expressly provided by law."

The Universal Military Training and Service Act does not "otherwise" provide a separate and different statute of limitations.

The Courts below avoided the five-year limitation period by holding that the offense was a continuing one, in reliance, not upon the statute, but upon a Selective Service regulation (32 C.F.R. § 1611.7[c]), which provided that "(c) The duty • • • to present himself for and submit to registration *shall continue at all times* • • •" (emphasis supplied).

The Court of Appeals frankly conceded that "the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term" (A. 302). It recognized that the continuous offense doctrine was not mandated by the statute, but by the *regulation*. Despite this the Court held the indictment not to be time-barred on two grounds:

First. That the five-year statute *is* being recognized, but that it does not begin to run when the crime is completed because the regulation prescribes a continuing duty; and

Second. That if the five-year statute is in fact deemed extended, it is because the continuing duty regulation is an express provision of "law" (A. 303-304).

It expressly held, moreover, that the regulation is not outside the Congressional grant of power (A. 302-303).

We respectfully contend that the Court erred in all of its alternative formulations.

(*i*) *The Court's concession that "for all practical purposes"* (A. 302) *the general five-year statute of limitations has, indeed, been extended is more cogent than its lip service to the five-year statute and its conclusion that the issue is merely when that statute begins to run.*

There is no expression of Congressional policy to indicate a desire by Congress to have a different statute of limitations apply to failure to register for the draft than to other crimes. Where Congress intended to impose a continuing duty with respect to selective service, it knew how to say so.

Unlike § 453, § 454 does contain a continuing duty provision. Thus, § 454(a) provides that any registrant who has failed or refused to report for induction "*shall continue to remain liable for induction* and when available shall be immediately inducted" (emphasis supplied). The difference in treatment in the two sections is significant (See *McKart* v. *U. S.*, 395 U. S. 185, 191 [1969]).*

In further contrast to the statute at bar, we refer, for illustrative purposes, to the offense of concealment of a bankrupt's assets under 18 U.S.C. § 3284. Congress there expressly provided that such offense shall "be deemed to be a continuing offense" until the debtor is discharged or a discharge is refused; and that the period of limitations "shall not begin to run" until such time. In the absence of statute, the crime had been held not to be a continuing offense (*Warren* v. *U. S.*, 199 Fed. 753 [5th Cir. 1912]).

(ii) The exception provision of the general statute of limitations must be strictly construed.

As Mr. Justice Douglas said for the Court in *Pendergast* v. *U. S.*, 317 U. S. 412, 418 (1943):

> "Statutes of limitations normally begin to run when the crime is complete. See *U. S.* v. *Irvine*, 98 U. S. 450. Every statute of limitations, of course, may permit a rogue to escape. Yet, as Chief J. Marshall ob-

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* The Court in *McKart, supra,* said:

"The *section* says nothing about the continuing existence of a family unit, even though other provisions of the Selective Service laws make similar conditions explicit in other contexts." (Emphasis supplied.)

> served in *Adams* v. *Woods, supra* [2 Cranch 336] 342 'not even treason can be prosecuted after a lapse of three years.' That was still true at the time of this offense. See R. S. § 1043, 18 U.S.C. § 581."

Any exception to a general statute of limitations "is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose. (*U. S.* v. *Dickson*, 15 Pet. 141, 165; *Ryan* v. *Carter*, 93 U. S. 78, 83." (*U. S.* v. *McElvain*, 272 U. S. 633, 639 [1926].)

As this Court said in *U. S.* v. *Scharton*, 285 U. S. 518 (1932), at pp. 521-522:

> "Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. *United States* v. *McElvain*, 272 U. S. 633, 639. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses."

See also, *Bridges* v. *U. S.*, 346 U. S. 209, 215-216 (1953).

As recently as last term, the Court reiterated "the principle that criminal limitation statutes are to 'be liberally interpreted in favor of repose. *U. S.* v. *Scharton*, 285 U. S. 518, 522 (1932)'." (*U. S.* v. *Habig*, 390 U. S. 222, 227 [1968].)

Various attempts to extend general statutes of limitation by ingenious argument have been rebuffed by this Court. Thus, the prosecution theory that a subsidiary conspiracy to conceal the crime tolled the statute of limitations on conspiracy was rejected (*Grunewald* v. *U. S.*, 353 U. S. 391 [1957]; *Krulewitch* v. *U. S.*, 336 U. S. 440 [1949]). In *Fiswick* v. *U. S.*, 329 U. S. 211 (1946), the unanimous Court held that the last overt act of the conspiracy was the filing by one of the defendants of a registration statement under

the Alien Registration Act of 1940 in which he falsely failed to disclose his connection with the Nazi party. In *Pendergast* v. *U. S., supra,* the Court rejected the Government's argument that the statute did not begin to run from the time when the contempt of court was actually committed.

ALI Model Penal Code, Tentative Draft No. 5 § 1.07(4), criticizes the "continuous offense" doctrine in Selective Service registration cases, stating that "the continuous offense exemption too freely applied is inconsistent with the purpose of time limitations," citing as an example *Fogel* v. *U. S.,* 162 F. 2d 54 (1947), the original 5th Circuit opinion enunciating the "continuous offense" doctrine in a failure to register for the draft case (Comment, p. 23).

Congress itself seems to dislike the continuous duty doctrine where it involves a failure to file. For example, failure to file an income tax return would seem to be a perfect case for the application of the "continuous offense" doctrine, for the defendant there has never fulfilled his duty to file. Yet Congress has clearly stated its policy that the statute of limitations begins to run on the very day on which the return should have been filed, and is not tolled by the theory of continuing duty (26 U.S.C. §§ 6531, 6513).

(*iii*) *Congress has, in particular cases, by contrast, specifically provided "by law" for periods of limitation different from the period of five years prescribed in the general statute* (*18 U.S.C. § 3282*).

Thus, violations of the statutes against "gathering, transmitting or losing defense information" (18 U.S.C. § 793), for "gathering or delivering defense information to aid a foreign government" (18 U.S.C. § 794), and harboring persons suspected of such acts (18 U.S.C. § 791), prescribe a *ten* year statute of limitations for future offenses, other than capital offenses (Act, September 23, 1950, c. 1024, § 19, 64 Stat. 1005; see note to 18 U.S.C.

§ 792). Similarly, frauds relating to nationality, citizenship and passports are under a *ten* year statute of limitations (18 U.S.C. § 3291). The offense of conspiring to establish a totalitarian dictatorship also has a *ten* year statute of limitations (50 U.S.C. § 793[e]).

These illustrations compel the conclusion that when Congress, as a matter of policy in cases gravely affecting national security, desires to extend the general statute of limitations, it does so by the *enactment,* in pursuance of its powers under Article I, of a special statute.

The statutory illustrations given further demonstrate the dangers of making policy decisions under the guise of interpretation.

For the upshot is that for "all practical purposes" (A. 304), while the statute of limitations for treasonable activities is ten years, the period of limitations for a youth of eighteen years who fails to register is at least *thirteen* years (18 to 26 years—8 years, plus 5 year statute of limitation=13 years). Under the decision below, the statute would not run on an eighteen year old who fails to register until he is five days past his *thirty-first* birthday. Under the doctrine of other circuits it may never run (See, *e. g. McGregor* v. *U. S.,* 206 F. 2d 583 [4th Cir. 1953]; *Gara* v. *U. S.,* 178 F. 2d 38, 40 [6th Cir.], *aff'd.* 340 U. S. 857 [1950]).

So far reaching a deviation from the normal Congressional policy regarding statutes of repose demands an unequivocal expression of the Congressional will—by the enactment of a special statute. Anything less should be viewed as a determination of policy by the executive or the judicial branches of the Government. The history and spirit of our institutions—indeed, the very basis of our constitutional separation of powers—is repugnant to such a result.

(iv) The enunciation of a continuing offense theory, moreover, poses hard questions which the Court of Appeals

frankly recognized as "problems lurking in the background" (A. 304).*

It is no answer for the Court of Appeals to elide the question on the ground that a particular indictment "charged only one offense—wilful failure to register over a lengthy period of time—and appellant never did register" (A. 304). Even if the "continuing duty" theory did convert the failure to register into a single offense, the question still remains when that offense was committed or completed. Could a registrant defeat an indictment by claiming that he still had time to register at any time up to age 26? Such a contention would be absurd. But its very absurdity shows that the crime was completed and indictable when the petitioner failed to register on attaining the age of eighteen years. And there is no statute evidencing a Congressional intent that the ordinary consequences—the running of the general five-year statute of limitations *from that time*—should not follow.

The continuing offense theory, aside from having no statutory warrant, logically makes prosecution possible without any limitation whatever. Thus, under the wording of the regulation, a person seventy years old can be prosecuted for having failed to register fifty-two years before at the age of eighteen.

In addition to the formulations by the Court of Appeals of "problems lurking in the background," there is also the obvious question of double jeopardy.

The continuous offense theory of the Court of Appeals raises involved questions of double jeopardy, which are

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* All of these problems are integrally related to the question of Congressional intent. Thus, as the Court below noted, "is each day of failure to register a separate offense, for which a prosecution can be brought?"; "Can the knowing and wilful failure to register when the duty first attaches be legally cured by a subsequent tardy registration?"; "are there other continuing duties under the selective service system that are not cut off at age 26, and, if so, when, if ever, does the statute of limitations run as to them?" (A. 304).

inescapable. If a defendant (like Toussie) fails to register, is convicted and receives a jail sentence which he has served by the time he is twenty-two years old, would he still be under a *duty* to register, under the theory of the Court below, when he gets out of jail? If he then fails to register, could the Government prosecute him again on the theory that his jail sentence gave him no absolution from his "duty" and hence, indict him once more? Even though Toussie may have been indicted on the theory of a single offense in this particular indictment, there is no escaping the dilemma that a continuing duty theory imposes on the issue of double jeopardy. (See *e.g., U. S.* v. *Bendik*, 220 F. 2d 249 [2d Cir. 1955]).

This, too, can be avoided by the construction we urge, namely, that there is no continuing duty, but that the duty has been breached by a failure to register upon the attainment of age eighteen.

(v) The statute and proclamation itself make it clear that the duty to register pertaining to this case was a duty to register when the petitioner attained his eighteenth birthday and five days thereafter.

Contrary to the regulations, the statute and proclamations do prescribe specific dates *and not a period of years* for accomplishment of the registration. With respect to persons who were not yet eighteen years old at the time the statute took effect (like petitioner) Presidential Proclamation No. 2799, subd. (j) of paragraph 1, simply provides that "Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter." Presidential Proclamation No. 2942 issued in 1951 makes similar provision.

It is thus evident that a person is given only one time to register. With respect to those reaching the age of eighteen years *after* the effective date of the statute (like

petitioner), that one specific time is when he reaches the age of eighteen years and five days.

We submit that if a person fails to register on the prescribed date or within the five-day period thereafter, as above set forth, the breach of duty occurs *then and there.* There is nothing in the statute which says that the breach of duty to register continues for eight years before the statute begins to run, as the Court below found.*

B. The Regulations as construed are an unconstitutional invasion of legislative power.

To the extent that the regulations import a concept of duty to register beyond the dates prescribed by the statute, the breach of which gives rise to criminal culpability, we submit that an unconstitutional usurpation of legislative authority has been effected.

The argument of the Court of Appeals, in this respect also, we respectfully submit, is untenable. Historically an

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* It is true, as the Court of Appeals noted in its opinion (A. 301-302), that the prior decisions on the subject have held that a continuing duty to register obtains, which serves to preclude application of the statute of limitations (*Fogel* v. *U. S.*, 162 F. 2d 54 [5th Cir.], cert. denied, 332 U. S. 791 [1947]; *McGregor* v. *U. S.*, 206 F. 2d 583 [4th Cir. 1953]; *Gara* v. *U. S.*, 178 F. 2d 38, 40 [6th Cir. 1949], affd. 340 U. S. 857 [1950]; Cf. *U. S.* v. *Guertler*, 147 F. 2d 796 [2d Cir. 1945]). But it does not appear that the constitutional question was raised.

Indeed, a conflict exists even between those cases and the decision of the Court of Appeals below. In *McGregor* and *Gara, supra,* the continuing duty imposed was deemed to be open-ended with no time limitation whatever. The Court of Appeals in this case recognized that such logical extension of the holdings in those cases was "unfair and absurd" (A. 303). It, therefore, imposed a cutoff date at age 26. A conflict of interpretation, therefore, now exists between the Second Circuit in this case and the Fourth and Sixth Circuits in the *McGregor* and *Gara* cases. *Gara* reached this Court. It was affirmed, however, by an equally divided Court. Resolution of the issue is, therefore, a matter of first impression for this Court.

extension of a statute of limitations is a legislative, not an executive function.*

The common understanding of the Bar is expressed in ALI Model Penal Code, Tentative Draft No. 5, § 1.07(4):

> "An offense is committed either when every element occurs, or, if a *legislative* purpose to prohibit a continued course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed." (Emphasis supplied)

The American Law Institute there comments, p. 23:

> "The draft in effect provides a presumption against a finding that an offense is a continuing one for purposes of time limitation."

When Congress used the phrase "Except as otherwise expressly provided by law," it meant by statute, not executive order. The enactment of statutes of limitation is so exclusively within the legislative sphere that it would strain language to hold that Congress intended so serious

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* The very phrase "statute" of limitations connotes legislative action. An early statute of limitations in England was created by Parliament, not the King. (The Treason Act, 1695 [7 and 8, Will. IIIc. 3]; 9 Halsbury Statutes of England 82).

The first criminal statute of limitations after the adoption of the Constitution was by Act of April 30, 1790, Ch. 9 § 32, 1 Stat. 119 (See 18 U.S.C. § 581-3).

In the Colonies before the Revolution limitations for prosecution of crime were by the Colonial legislatures (see 102 Univ. of Pa. L. Rev. 630, 631 [1954], citing Whitmore, Colonial Laws of Mass. 163 [1889]; Charter and Laws of the Province of Pa. 1682-1700 [173-4] (George, Neod and McComant [1879]).

As early as 1684 there was a 6 months limitation on offenses against the Government, but the limitation was created *by statute.* (See also Howe, Readings in American Legal History 19 [1949], Radin, Anglo-American Legal History § 79 [1936].)

a departure from the clear historic meaning of "law" in this context.*

As the regulation was construed below, it is unconstitutional as an executive usurpation of well-defined historical legislative power. Only Congress can extend or provide for the tolling of its own statutes. While it is perhaps fashionable these days to fudge the separation of powers as constitutional doctrine, the rule is firmly embedded in our constitutional tradition that the executive may not legislate as such (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 [1935]; *A.L.A. Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495 [1935]; *Youngstown* v. *Sawyer*, 343 U. S. 579 [1952]; see *Leary* v. *U. S. supra*, 395 U. S. 6, 24 [1969]).

Youngstown v. *Sawyer*, permitted the majority to state their views on the constitutional doctrine of separation of powers in historic language.

Mr. Justice Black, for the Court, wrote:

> "In the framework of our constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law-maker." (at p. 587)
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> • • •
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> "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes of freedom

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*We urge that "by law" means by "statute" historically. This is supported by Reviser's Note to 18 U.S.C. § 3282 which says: "Section 582 of Title 18, U.S.C. 1940 ed. and Section 746(g) of Title 8, U.S.C. 1940 ed., Aliens and Nationality, were consolidated. 'Except as otherwise expressly provided by law' was inserted to avoid *enumeration* of exceptive provisions" (emphasis supplied). This obviously meant statutory provisions.

Moreover, the phrase "required by law or regulations" is commonly used to distinguish between a *statute* and a regulation. See e.g. 26 U.S.C. § 6531.

> that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand." (at p. 589)

Mr. Justice Douglas, concurring in *Youngstown* said:

> "We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not *some* legislative power in the Congress; Article I, Section 1 says 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'" (at p. 630)

As Mr. Justice Brandeis had earlier written in his dissent in *Meyers* v. *U. S.*, 272 U. S. 52, 293 (1926):

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."

In the absence of a special statute, the general statute of limitations creates a *jurisdictional* fact which the prosecution must prove. A plea to the statute of limitations is a plea to the merits (*U. S.* v. *Barber*, 219 U. S. 72, 78 [1911]). Such a plea affects his liability [the defendant's] "as matter of substantive law" (Holmes J. in *U. S.* v. *Oppenheimer*, 242 U. S. 85, 87 [1916]; see also *People* v. *Hines*, 284 N. Y. 93 [1940]).

Timeliness is an *essential element* of a crime (See *Flemister* v. *U. S.*, 260 F. 2d 513 [5th Cir. 1958]; *White* v. *U. S.*, 216 F. 2d 1 [5th Cir. 1954]). We believe there is no precedent for the promulgation of an essential jurisdictional element of a crime by the Executive branch.

If, as Mr. Justice Holmes said, the question of whether a prosecution is time-barred is a "matter of substantive law" (242 U. S. at p. 87), then the only branch of govern-

ment constitutionally able to legislate that substantive law is Congress itself. If the period prescribed by Congress has, indeed, passed, then the statute of limitations has run and the plea in bar is an assertion that there is no longer a prosecutable crime, for one of its elements, timeliness, is gone.

Accordingly, no matter from what aspect the statute of limitations is viewed, historically, by Congressional intention, or as practical matter, its exclusive source must be Congress alone in which is vested all legislative power.

It is constitutionally forbidden for the Executive branch to create a continuing offense without a specific mandate from Congress. History, as we have seen, *supra,* shows a number of continuing offenses created by Congress itself. We know of no such history for the Executive branch.

The suggestion that the Executive branch had the right to create a continuing offense under the Universal Military Training and Service Act is like saying that the Commissioner of Internal Revenue has the right to prescribe by regulation that a failure to file an income tax return is a continuing offense. It would be for Congress and Congress alone to make such a determination.

The Court below assumed, moreover, that the statutory language presumably showed an intention on the part of Congress to permit the President to make the duty to register a continuing duty. It relied upon the language giving the President power to fix the time or times and place or places for registration (A. 302; 50 U.S.C. App. §453).

We submit that a close reading of the statute (50 U.S.C. App. §453) indicates that the reference to "such" time or times or place or places indicates that it is in apposition to the first and each subsequent registration proclaimed by the President. When Congress said *at* such time or times and place or places, it meant specific days and time of day. The requirement is that he register *on* the day or days

fixed for the first or any subsequent registration and that he must present himself at such time or times or place or places. This construction is fortified by the circumstance that Congress has specifically provided for a *continuing* liability for induction (18 U.S.C. § 454[a]), although it did not do so for registration.*

POINT II

The fifth amendment precludes application of the continuing duty theory to the act of registration.

If the Court holds the instant prosecution to have been time-barred, no constitutional question is reached. The statute should be so construed, if possible, as to avoid constitutional doubts (*Crowell* v. *Benson*, 285 U. S. 22, 62 [1932]; *U. S.* v. *Rumely*, 345 U. S. 41, 45 [1953]). If the Court accepts the continuing duty theory to toll the statute of limitations, a serious constitutional question, in our respectful submission, does arise. Either the statute of limitations should be so construed as to avoid constitutional doubt or its application herein should be stricken as violative of the petitioner's rights under the Fifth Amendment.

The Courts below held that the Selective Service Regulation (32 C.F.R. § 1611.7[e]) (App. to Brief p. 13) imposed a "continuing duty" to register on a delinquent who had initially failed to register at age eighteen.

Our position may be stated as follows: If it is held that one has a continuing *duty* to register, under penalty of criminal sanction, registration at any time after the date first required therefor is tantamount to compelling an admission of criminal culpability for prior failure to register.

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* The regulations even provide that "All persons waiting to register at any place of registration at the closing hour on the day or *the last one of the days fixed* for their registration by the Presidential proclamation shall be registered." (32 C.F.R. § 1613.1[b]; emphasis supplied) (App. to Brief, p. 14.)

Registration cannot be compelled under penalty of criminal sanction at any time after the date first prescribed therefor; otherwise one is being required to confess guilt in violation of Fifth Amendment guarantees (*Albertson* v. *Subversive Activities Control Board, supra; Marchetti* v. *U. S., supra; Grosso* v. *U. S., supra; Haynes* v. *U. S., supra; Leary* v. *U. S., supra.*)

If there is a continuing duty to register, it is not accompanied by a statutory immunity from prosecution for a late registration. The duty to register, after the date of initial registration has passed, is still compulsory, but the very act of compliance renders the late registrant subject to criminal prosecution. This is compulsory self-incrimination in its simplest form.

It is as if there were two registration statutes: (1) a statute requiring registration on the first day; and (2) a statute requiring registration thereafter with a provision that compliance under the second statute renders the registrant subject to prosecution under the first statute. Even though the duty may continue, there is no doubt that a wilful failure to register when first required to do so had already made a completed crime. That being so, subsequent registration itself may be tantamount to a confession—and a confession compelled by the continuing duty theory. The continuing duty regulation requires him in the course of late registration "to identify himself" as a person who had not registered on time (see *Leary* v. *U. S., supra,* 395 U. S. 6, 16). The failure to provide for a statutory immunity coextensive with the constitutional privilege makes him as vulnerable to prosecution as the Communist party member, the gambler, or the marijuana possessor.*

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* (See also *U. S.* v. *Rosenson,* 291 F. Supp. 874, 876 [E. D. La. 1968] for application of this Court's decisions to a prosecution for failure to surrender, upon re-entry, a certificate evidencing a prior registration, required to have been obtained before leaving the United States.)

The standard emerging from this Court's decisions for application of the Fifth Amendment is the "substantiality of the risks of incrimination" which confront the claimant. (See e.g., *Marchetti* v. *U. S.*, 370 U. S. at p. 54). If the hazards created are "real and appreciable," application of the Fifth Amendment is required (*Haynes* v. *U. S.*, 390 U. S. at p. 97). These tests were deemed satisfied in *Marchetti,* the Court observing that under the registration provisions there involved, the defendant "was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in the chain' of evidence tending to establish his guilt" (390 U. S. at p. 48).

Similarly, in *Haynes,* the prospective registrant could reasonably fear that the possession established by his registration would facilitate his prosecution under the making and transfer clauses of § 5851; and that the information required to be furnished under the registration statute was "likely to facilitate their arrest and eventual conviction."

The regulatory scheme involved in the case at bar as construed by the Courts below utterly fails to provide a means for one who had previously failed to register to register subsequently without requiring him to sign a confession of guilt. This is far more than the mere "facilitat[ion]" of "his prosecution" (*Haynes* v. *U. S., supra*), sufficient to require application of the Fifth Amendment.

Albertson, supra, teaches that where the questions on the forms to be filled out involve risk of incrimination even under the same Act (there § 4(a) of the Subversive Activities Control Act, 64 Stat. 991, 50 U.S.C. § 783[a]), such requirement is inconsistent with the protection of the self-incrimination clause (382 U. S. at pp. 76-78). *Haynes, supra,* also involved incrimination under the same Act (390 U. S. at pp. 97-99).

We, therefore, refer to the applicable regulations in Title 32 C.F.R. § 1613.1—16 (App. to Brief, pp. 14-18). It is first provided in § 1613.11(a) that "every registrant before being registered shall enter his name and place of residence upon one of the numbered lines on the Tally Sheet" and "shall be registered on a Registration Card (SSS Form No. 1)." Among the more significant items which must be included on the form, which the registrant is required to divulge (and its accuracy ensured by the registrar), is the registrant's *date of birth* (§ 1613.12[c]).

The context of the foregoing procedures is one of compulsion, in its entirety, by direct mandate of the statute and the regulations. Section 1613.16 of the regulations, as well as § 462 of the Act, contemplate stiff penalties (5 years) for failure to divulge the information. Immediate referral of the matter to the United States Attorney is also mandated by the regulations. "Persons attempting to obstruct or delay" registration, the regulations further provide "should be dealt with promptly and firmly" (32 C.F.R. § 1613.16).

Section 1642.3 (App. to Brief, p. 18), provides that compliance by the draft board with procedures concerning delinquency (i.e., warnings to registrants) is *not* a condition precedent to prosecution under Title 1, § 12 of the Military Selective Service Act of 1967 (50 U.S.C. App. § 462).

The only way a registrant could terminate his "continuing duty" would be to incriminate himself by late registration. In other so-called "continuing offenses" like conspiracy, the defendant does not have to perform an act of self-incrimination in order to abandon the conspiracy. Under the reasoning of the Court below there is no way to abandon the "continuing offense" except by the act of registering—an act of compulsory self-incrimination.

The reasoning of the Court of Appeals, distinguishing the *Albertson, Marchetti, Grosso* and *Haynes* decisions, is that "his (petitioner's) inaction did not give rise to the

threat of punishment beyond that he had already risked" (A. 307). The distinction is invalid. The Fifth Amendment does not deal with punishment, but with *evidentiary* self-incrimination.

The constitutional test, we submit, is not whether additional punishment is provided but whether the statute, as construed, requires the individual to perform an act which is self-incriminatory. Analysis will be furthered by treating the draft registration statutes as two statutes as previously discussed, *supra*, p. 25.

The Communist or gambler at least gets absolution from prosecution under the registration statute by registering; the man who registers late for the draft, as his duty was construed below, does not. He has merely begun the process of convicting himself.

These views have been re-emphasized by the Court in the recent *Leary* decision, as follows (395 U. S. at p. 18):

> "Since compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination."

So, too, in contrasting the right of an accused under the Fifth Amendment to remain silent at his trial, the Court in *Leary* aptly characterized the aspect of the privilege here involved as "the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act" (395 U. S. at p. 28).

The Court below conceded that it is, indeed, "arguable" that the continuing duty regulation "is directed at a 'selective group inherently suspect of criminal activities' *Albertson* v. *Subversive Activities Control Board*, *supra*, 382 U. S. at 79" (A. 305-306). The group who failed

to register at eighteen is a "selective group inherently suspect of criminal activities". It is well-known that there are many young men in this group who are colloquially known as "draft resisters". It is to this group that the regulation addresses itself with a continuing duty.

Whether Congress had as its "purpose" entrapment of young draft resisters is irrelevant. *Albertson* and the line of cases following it cannot be distinguished upon the ground that in those cases it had been the Congressional purpose to strike at a particular group. The constitutional test is not the purpose of Congress, but whether, as objective fact, the particular group was struck. The Court made this clear in *U. S.* v. *O'Brien,* 391 U. S. 367, 383 (1968). The Court there rejected the conception that the "purpose" of Congress was at issue in constitutional adjudication, citing *McCray* v. *U. S.,* 195 U. S. 27, 56 (1904) and *Arizona* v. *California,* 283 U. S. 423, 455 (1931). In the light of the long history of this constitutional doctrine, it is difficult to say that this Court in *Albertson* and the line of cases succeeding *Albertson* based its constitutional adjudications on some unlawful "purpose" of Congress. It is the impact on the individual that made the statutes unconstitutional.

The Court below proceeded to reason, however, that "many initial failures to register may be due to such innocent reasons as illness, ignorance, or inability to get to a local board" (A. 306). So, too, there may be a lawful possessor of firearms or of marihuana.* This does not preclude application of the constitutional privilege to the statute at bar. The Fifth Amendment applies, as here, where the status disclosed as a result of the subsequent registration is "presumptively" indicative of guilt or *prima facie* on the issue (*Russell* v. *U. S.,* 306 F. 2d 402, 411 [9th Cir. 1962]; cited with approval by this Court in

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* See 26 U.S.C. §§ 4741-4752 and 4771-4775; *U. S.* v. *Sanchez,* 340 U. S. 42 (1950).

Haynes, supra). Similarly, the Court held in *Albertson, supra,* that it is sufficient if the information called for by the registration forms "might be used as evidence in or at least supply investigatory leads to a criminal prosecution" (382 U. S. at p. 78).

We hardly need remind the Court, moreover, that the protection of the Fifth Amendment extends to the innocent as well as the guilty (*Grunewald* v. *U. S.*, 353 U. S. 391 [1957]). Here the delinquent registrant would be faced with the burden of showing he had been ill or ignorant, for he is presumptively guilty of an act of omission.

Under the decision of the Court below a person *must* first subject himself to prosecution under his continuing duty in order to invoke the Fifth Amendment. The protection of the Fifth Amendment, we submit, cannot be so circumscribed.

The Court below while "conced[ing] that doing so might well focus unwanted attention" on the delinquent registrant, maintained that "it may be possible for a young man to register late without giving the incriminatory information, cf. *United States* v. *Sullivan,* 274 U. S. 259 (1927)" (A. 306). We assume the Court of Appeals had in mind the appearance of the young man at the draft board, and his invocation of the Fifth Amendment in response to certain questions which he is required to answer, such as the date of his birth.

In the first place, the appearance of the young man at the draft board without giving the required information would not serve to qualify him as having submitted to registration in accordance with the prevailing case law. (See e.g., *Michener* v. *U. S.*, 184 F. 2d 712 [10th Cir. 1950]; see also *Cannon* v. *U. S.*, 181 F. 2d 354 [9th Cir. 1950]; *U. S.* v. *Henderson,* 180 F. 2d 711 [7th Cir. 1950]; *Richter* v. *U. S.*, 181 F. 2d 591 [9th Cir. 1950]).

Second, such a procedure would serve to emasculate the constitutional provision. Invocation of the Fifth

Amendment under such circumstances would be an unmitigated admission of criminal culpability. As the Court stated in *Marchetti, supra,* "to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it' " (390 U. S. at p. 50).

Appearance at the draft board under the circumstances here projected, would require invocation of the Fifth Amendment even as to divulgence of the defendant's name (cf. *Kaohelaulii* v. *U. S.,* 389 F. 2d 495 [9th Cir. 1968]).

In *Kaohelaulii,* the defendant reached the age of eighteen on January 28, 1956. He did not register for the draft, however, until eight years later, on October 15, 1964. Immediately after his tardy registration, he was interviewed by an agent of the FBI and thereafter indicted and convicted for having failed to register for the draft on his eighteenth birthday or thereafter until his appearance at the board to do so on October 15, 1964 (389 F. 2d at p. 496).

Third, the very refusal to answer questions on the form, such as those relating to age, make him immediately susceptible to prosecution. (cf. *Albertson, supra.*)

Fourth, "[B]arring" the use of any "possibly incriminating information in any subsequent prosecution," as the Court of Appeals further suggested (A. 306), adopting Judge Dooling's reasoning, would not satisfy the mandate of the Constitution. The Court of Appeals, indeed, acknowledged that Judge Dooling's reasoning was before its rejection by this Court in the cases cited above (A. 306).

So, too, the balancing of constitutional interests alluded to by the Court of Appeals in its opinion (A. 305, 307-308), cannot further serve to preclude application of the Fifth Amendment. True, the Government is constitutionally authorized to raise an army. Self-registration—*to the extent that it will involve incriminatory admissions*—however, is not necessary to serve the legitimate governmental purpose. Alternative procedures for securing the necessary infor-

mation could well be utilized without impinging upon the rights guaranteed by the Fifth Amendment. Such was the express reasoning of this Court in *Marchetti* and *Haynes, supra,* where it was stated in relevant part that the Court was "fully cognizant of the Treasury's need for accurate and timely information, but other methods, entirely consistent with constitutional limitations, exist by which such information may be obtained" (*Haynes,* 390 U. S. at p. 98; see also *Marchetti,* 390 at U. S. at p. 60).

The sources for securing such information and procedures satisfying the need of the Government for information are available without compelling the defendant to provide the information and inculpate himself. For example, municipal Boards of Health (birth certificates) or Boards of Education (school records) could be required to file duplicate copies of their records with the appropriate Federal authorities and thus preserve the integrity of the Fifth Amendment.

The now accepted safety value of the immunity statute might also be utilized. It would be a simple matter for Congress to grant immunity from prosecution to those questioned and required to divulge information in connection with registration. (See *Brown* v. *Walker,* 161 U. S. 591 [1896]; *Ullman* v. *U. S.,* 350 U. S. 422 [1956]). Under such circumstances, one who failed to register on his 18th birthday might, if Congress so dictated, be subjected to the continuing duty to register. He could not then avail himself of the protection of the Fifth Amendment for failure to do so since his own statements could not be used.*

* In terms of practical effect, moreover, the use of an immunity provision would serve a salutary purpose. A young man at the age of 18, impressionable and immature in many ways, may have been impelled for misguided reasons to breach his duty of registration. In later years, he may well recognize the folly of his ways. However, without the protection of an immunity statute, he is afraid to register for fear that he will be prosecuted for previously failing to do so.

(*footnote continued on following page*)

Under the circumstances, the indictment should have been dismissed (*U. S.* v. *Covington*, 395 U. S. 57 [1969]). The Government cannot have its cake and eat it. If there is no continuing duty, the statute of limitations has run. If the Government insists that the statute has not run because of a continuing *duty*, the compulsion inherent in that *duty* violates the Fifth Amendment privilege.

POINT III

The petitioner was entitled under the First Amendment to have the jury pass on the sincerity of his conscientious beliefs which prevented him from registering.

The jury was not permitted to pass upon the petitioner's beliefs that he was a religious conscientious objector. He requested the following charge to the jury, which was denied by the trial court:

> "15. If you find from the testimony in this case that the defendant held a conscientious and religious belief that the act of registration was only another extension of war, violence and legalized killing, and if you believe that the defendant's failure to register

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(*footnote continued from previous page*)

The thrust of an immunity statute would not result in the delinquent registrant being set free. He would be inducted into the Army, if his classification warranted it. He would be free only from *prosecution* for registering late, not from Army service. This would probably encourage delinquent registrants to register. The immunity would, of course, not apply if the non-registrant was apprehended for failure to register by other than self-incriminatory means.

Finally, "[t]o hold that since the defendant made a choice to commit the primary offense the privilege is lost would be to abolish the privilege in one of its central applications, to abolish it in cases in which it has always historically applied, to defeat its very purpose" (Mansfield, 1966, Supreme Court Review, *The Albertson Case; Conflict Betwen the Privilege Against Self-incrimination and the Government's Need for Information*, 103, 130-131).

> arose from such belief, then you must find the defendant not guilty." (A. 50)*

In its main charge the Court stated:

> "* * * and if * * * he nevertheless chose to disregard the law and abide by what he believed to be a higher moral principle, his reason, his motive for failure to register under those circumstances, is not an answer to this charge." (A. 286)

We maintain that this was constitutional error and that the Court should hold that the First Amendment's guaranty of freedom of conscience bars the conviction of one who failed to register on the grounds of religious conscientious belief sincerely held; that, at the very least, he is entitled to have a jury pass on the issue.

This case does not involve selective conscientious objection to a particular war. Nor does it involve a nonreligious conscientious objection.

The "free exercise" clause of the First Amendment applies to the principled religious objector whose principles refuse to permit him to register for selective service because he believes the registration process to be part of the process of killing. If he sincerely believes this, the Government must be careful to avoid suppression of these beliefs. It should not put him to the cruel choice of surrendering his beliefs to the will of the State or of becoming subject to prosecution without the right to interpose a defense based upon his religious beliefs.

Petitioner in the case at bar testified that his religious beliefs would not permit him to participate in the act of registration (A. 177-8; p. 6, *supra*). The sincerity of his beliefs could not be tested except in the forum of his crim-

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* See also Request to Charge No. 17 (A. 50). Other instructions were requested as to the sincerity of petitioner's beliefs and also denied (Requests to Charge No. 4 and No. 5 [A. 48-49]).

inal trial. But in that trial the jury was not permitted to pass upon his defense based upon his religious beliefs. Petitioner was thus convicted without any tribunal passing upon the sincerity of his beliefs. We urge that, in the circumstances, this constitutes a violation of the "free exercise" clause of the First Amendment.

Chief Justice Hughes dissenting in *U. S.* v. *MacIntosh*, 283 U. S. 605, 633-4 (1931) (joined by Justices Holmes, Brandeis and Stone), maintained that objection to conscription as a matter of conscience was protected by the First Amendment. He wrote in relevant part as follows (283 U. S .at pp. 633-4):

> "I agree with the statement in the opinion of the Circuit Court of Appeals in the present case that 'This Federal legislation is indicative of the actual operation *of the principles of the Constitution*, that a person with conscientious or religious scruples need not bear arms, although as a member of society, he may be obliged to render services of a non-combatant nature.'" (Emphasis supplied)

This Court in *Girouard* v. *U. S.*, 328 U. S. 61 (1946), overruled the *MacIntosh* decision, *supra*, as well as *U. S.* v. *Schwimmer*, 279 U. S. 644 (1929), and while basing its decision on a construction of the statute, stated that "freedom of religion *guaranteed by the First Amendment* is the product of that struggle," referring to conscientious objection to bearing arms (emphasis supplied).

We respectfully submit that the ambit of protection constitutionally afforded one's religious beliefs cannot be limited to induction and actual service in the Armed Forces alone; but where warranted by the genuine belief of the individual must also cover the registration requirements of the draft law. The test should be the sincerity of the individual's view. The Courts of Appeal, still following the majority in *MacIntosh*, have held that the First Amendment does not protect conscientious objectors from bearing arms or registration for the draft. (See, e.g.,

Richter v. *U. S.*, 181 F. 2d 591 [9th Cir. 1950]; *Michener* v. *U. S.*, 184 F. 2d 712 [10th Cir. 1950]; *U. S.* v. *Kime*, 188 F. 2d 677 [7th Cir. 1951]; *U. S.* v. *Kissinger*, 250 F. 2d 940 [3rd Cir. 1958]; *Etcheverry* v. *U. S.*, 320 F. 2d 873 [9th Cir. 1963]). We submit that in so doing the Courts of Appeal have failed to give due effect to the import of *Girouard* and *Sherbert* v. *Verner*, *supra*, 374 U. S. 398 (1963).

The Court of Appeals below, indeed, recognized that "a proper test of a civilized society is the solicitude with which it treats its principled dissenters", and that "in theory the sincerity of one who claims that his conscientious beliefs prevented him even from registering could be tested by the trier of fact in a criminal trial" (A. 308). But it held that "under present doctrine requiring them to register for eventual assignment to non-military alternative service is constitutional" and "the present procedures of administrative decision and judicial review do not constitute an infringement of the First Amendment" (A. 308-309).

The Court of Appeals in the instant case cited no precedent for its view, but indicated that *U. S.* v. *Nugent*, 346 U. S. 1 (1953), "emphasized the constitutionality of the statutory treatment afforded conscientious objectors, which required registration, then investigation of the sincerity of alleged religious beliefs and, finally, assignment to non-military alternative service." (A. 308.) We submit that *Nugent* merely was "concerned with the procedure, established by regulation and practice, which is followed when a conscientious objector's appeal is referred to the Department of Justice" (346 U. S. at p. 4). This Court there upheld the procedure against a claim that failure to show the petitioner the FBI reports was a violation of due process.

The *Nugent* decision does not cover the situation where a conscientious objector truly believes that adherence *to the registration system itself* is contrary to his fundamental beliefs.

If a conscientious objector fails to register *because* of his beliefs, there is no tribunal that can pass upon the validity of such beliefs other than the trial jury when he is prosecuted. To take away from the trial jury the right to determine the bona fides of his conscientious beliefs is to invade that field of conscience which this Court has recognized in the case of other principled dissenters.

The Court of Appeals for the Second Circuit itself recognized as late as 1964 that the question was still open "whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress". (*U. S.* v. *Seeger*, 326 F. 2d 846 [2d Cir. 1964].) This Court construed the Act of Congress in *Seeger* so as to avoid passing upon the constitutional issue. In the instant case there is no statute that can be construed in such manner as to avoid the constitutional issue (except for the Statute of Limitations point).

The objection to *registration* for conscription as an integral part of the process of war itself is a matter of religious principle to some. Mr. Justice Brennan, concurring in *Abington School District* v. *Schempp*, 374 U. S. 203, 250 (1963) said:

> "But we must not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles.*"

The cases in which dicta appears to have given support to the theory that religious conscientious objection is not protected by the First Amendment are cases where a privilege was sought, the attainment of which was completely voluntary on the part of the individual concerned. Thus, in *Hamilton* v. *Regents*, 293 U. S. 245 (1934), attendance at the University was voluntary and if a student was opposed to military training he was not compelled to attend. In

In re Summers, 325 U. S. 561, 572 (1945), the 5 to 4 decision involved the privilege of practicing law. Even the earlier cases of *Schwimmer and MacIntosh*, now overruled, dealt with the privilege to become naturalized.

The distinction was explained by Mr. Justice Brennan in the *Abington School District* case, *supra*, 374 U. S. 203 at pp. 250-53. Contrast the ruling in *West Virginia Board of Education* v. *Barnett*, 319 U. S. 624 (1943), where the flag salute requirement was held unconstitutional. There school attendance was compulsory. There is nothing more compulsory than conscription, and the inevitable impingement on the religious liberty protected by the First Amendment does not involve the attainment of a privilege which is volitional on the part of the seeker of the privilege. In *Sherbert* v. *Verner*, *supra*, Mrs. Sherbert was not required to violate her faith; she was merely denied a benefit if she failed to do so. The conscientious objector would be *compelled* to act contrary to his religious belief. The mandate is specific: Give up your religious belief that registration is part of a total process that is contrary to your religious belief or go to jail.

It can hardly be said that religious conscientious objection was deliberately excluded from First Amendment protection, since there was no Federal conscription when the Bill of Rights was enacted. Since the First Amendment was then believed to be a limitation only on Federal power, the occasion for determining the constitutional protection of religious conscientious objection against the Federal Government did not arise. There was no Federal conscription until 1863; before that the primary responsibility for the Army was rested in the States (See, Dumbauld, *The Bill of Rights and What it Means Today* (1957), 19, 23-40; 11 Arizona L. Rev. 249, 262-4 and Footnote 63). The muse of history wears variegated colors and in the light of modern times, sometimes shifts its hues. Just as "separate but equal" was stricken by this Court despite

years of adherence, the conception of Congressional grace as the foundation of conscientious objection no longer accords with modern views of the "free exercise" clause. Not every nuance of the "free exercise" clause need have a historical basis. In the growth and complexity of our modern society adjustment of the meaning and content of the First Amendment becomes a continuing process.

Let it be conceded that the free exercise clause is subject to some governmental restraint for the public good (*Davis* v. *Beason,* 133 U. S. 333 [1890]; *Mormon Church* v. *U. S.* 136 U. S. 1 [1890]; *Jacobson* v. *Mass.,* 197 U. S. 11 [1905]; *Prince* v. *Mass.,* 321 U. S. 158 [1944]; *Cleveland* v. *U. S.* 329 U. S. 14 [1946]). But the test should be a balance between the religious rights of the individual and whether there is sufficient affirmative harm to society to make the religious activity intolerable. "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual." (*Girouard* v. *U. S. supra,* 328 U. S. at p. 68).

In the case of conscription, the number of conscientious objectors of the type here discussed is relatively small compared with the total pool of manpower available. No patriotic advocate would willingly endanger the capacity of Congress to raise armies. But the risks to the enforcement process here are minimal.

The National Advisory Commission on Selective Service reported that less than .06 per cent of the total number of registrants were classified as conscientious objectors. (*Report of the National Advisory Commission on Selective Service,* 136-45 [1967]). It may be assumed that the percentage of conscientious objectors who cannot participate in the process of registration itself is even more infinitesimal. Yet the deprivation of liberty for conscientious belief, without the benefit of defense, is a major assault upon the rights of individual conscience. It is not in

consonance with the spirit of the First Amendment to permit the imprisonment of an individual for sincerely held religious beliefs.

We recall the words of Mr. Justice Frankfurter dissenting in *Nugent* v. *U. S. supra* (346 U. S. at pp. 12-13):

> "Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake and where prison may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies."

There is no clear and present danger to the national security to permit a limited group of sincere believers to be afforded protection under the First Amendment. Nor is there a "subordinating interest which is compelling" (*Bates* v. *Little Rock,* 361 U. S. 516, 524 [1960]). The fact that Congress itself has traditionally recognized special treatment for conscientious objectors shows that exemption for conscientious objectors does not in fact substantially impair the power to raise an Army. If any liberty can be said to be as old as the Constitution itself, it is the right to refrain from participation in war on religious grounds. The right not to be compelled to commit what the individual believes to be homicide is a right of grave moral importance.*

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* It has been suggested on the basis of the historical background of the Bill of Rights that the right of the conscientious objector to be exempt from military service is constitutionally protected by the Ninth Amendment as well as the First (see 11 Arizona L. Rev. 249 [1969]; *Griswold* v. *Connecticut,* 381 U. S. 479 [1965], and the concurring opinion of Mr. Justice Goldberg).

It may be argued that the registration process itself is essential for the Government regulation of manpower. As we have pointed out in Point II, *supra*, however, the Government has the means to obtain the names and addresses of any age class by providing that the Board of Health records and school registration records be turned over to the Selective Service System. There is no requirement for a citizen to register for jury duty, for example, but the administrative arms of the Courts are able to find the citizen for jury duty when they want him. While all these considerations require a delicate balancing of interests, we believe that the risk of having insincere persons refuse to register and thus entirely evade detection is minimal. For there is always the danger of prosecution and conviction. Counter-balancing this inconvenience to the Government is the importance to be assigned to an individual's conscience.

As this Court said in *Sherbert* v. *Verner, supra* (374 U. S. at pp. 406-7):

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' . . . [I]t would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

And as Chief Justice Hughes said in memorable words, dissenting in *U. S.* v. *Macintosh, supra*:

> "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." (283 U. S. at 633-4.)

Under the doctrine laid down by this Court in *Sherbert* v. *Verner, supra*, the Government cannot meet the strin-

gent test of demonstrating "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." The moral harm inflicted upon society itself by brutally repressing matters of conscience is a basic consideration. The minimal effect upon the process of raising an Army on the other hand makes it clear, under the doctrine of *Sherbert* v. *Verner*, that the accommodation of public need and private conscience can be made without depriving the individual dissenter of his rights.

As to the balancing of interests, *United States* v. *Robel*, 389 U. S. 258, 264-66 (1957), holding a statute to be in violation of the First Amendment right of association which made it unlawful for a member of a communist-action organization to engage in any employment in a defense facility points the way. The Court said (389 U. S. at p. 264):

> "Yet, this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."

The facts bearing upon the sincerity of petitioner's views, grounded in family tradition, upbringing and independent pursuit of pacifism from the age of eleven—highlighted by his anti-war valedictory address at the age of fourteen—were amply demonstrated during the course of

the trial below. At the very least, we submit, petitioner was entitled to have the jury consider the issue under a proper charge.

This entire theory of petitioner's case, as well as the specific requests to charge on the issue, were rejected by the court below (See *e.g.*, A. 286, 134-36, 139, 154, 267, 271) —the court taking the view, contrary to *Girouard* and the *Macintosh dissent*, that obedience to a higher principle, grounded in conscientious and religious belief, did not constitute a defense to the crime.

It is respectfully submitted that this was constitutional error and that this Court should so declare, accommodating the matter within the scope of the First Amendment in accordance with the views of this Court, expressed in *Girouard* and the dissent in *Macintosh* as well as in *Sherbert* v. *Verner*. A constitutional right requires a forum in which such constitutional right can be tested by judicial process (See *Crowell* v. *Benson*, 285 U. S. 22 [1932]). In the case at bar, assuming the integrity of petitioner's position that he could not conscientiously participate in the act of registration, there is no tribunal competent fully to adjudicate his claim except a jury in the Federal Court when he is prosecuted.

If it be held that the recognition of conscientious objection is a matter of grace on the part of Congress, then Congress in providing for the type of relief discussed in *Nugent* v. *U. S.*, 346 U. S. 1 (1953), is discriminating between two types of conscientious objectors, each of whom may sincerely hold his beliefs as a matter of conscience. The first objector is the person who sees no conflict with his conscience in *registering* under the Selective Service System of conscription and asserting his status as conscientious objector as a part of that process. The other type of conscientious objector, whose beliefs are

as sincerely felt, is the man, like Toussie, who cannot bring himself, as a matter of religious conscience, to participate in the process itself because its end result is the killing of human beings. In either case, if the theory of conscientious objection is accepted, the right to assert it must be preserved. Otherwise, there is an obvious discrimination between the two types of persons holding the same beliefs, based on the same religious training. Since the conscientious objector is given the opportunity to support his conscientious beliefs, which, if accepted, provide for noncombatant status or exemption, by the same token, the non-registering conscientious objector who fails to register out of the same conscientious beliefs should be afforded a forum to determine the sincerity of his beliefs. In the latter case, there is no forum possible except the jury determining his guilt or innocence upon his prosecution for the crime involved in his failure to register.

The implicit discrimination here involved does not mandate a declaration that the procedures found valid in *Nugent* would, therefore, have to be found invalid, but rather that the grant of review by Congress afforded to one type of objector should be construed so as not to involve discrimination against another type of objector. To hold that the procedure in *Nugent* is the *only* procedure would be to create an unconstitutional discrimination. This is avoided by permitting the jury—the only tribunal that can ever take cognizance of the matter—to pass upon the sincerity of the defendant's beliefs. The second type of objector is forced to choose between abandoning his beliefs as to the registration process and obtaining a hearing on his religious beliefs. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would imprisonment without a right to defend. The Fifth Amendment, within its due process clause does, in fact, include a prohibition against discrimination. (See *Bolling* v. *Sharpe*, 347 U. S. 497, 499

[1954]; *Schneider* v. *Rusk*, 377 U. S. 163, 168 [1964]; *Shapiro* v. *Tompson*, 394 U. S. 618, 641-2 [1969]; *Sherbert* v. *Verner*, 374 U. S. 398, 406 [1962].)

Under *Sherbert* v. *Verner*, *supra*, the First Amendment also may well now include a prohibition against discrimination.

As we have indicated, we believe that the discrimination against the conscientious objector who cannot, in good conscience, participate in the act of registration itself is violative of the "free exercise" clause of the First Amendment. We respectfully suggest that *Sherbert* v. *Verner* and the Fifth Amendment cases cited, *supra*, point the way to such a constitutional determination even without a holding that exemption for religious reasons is itself an imbedded constitutional right.

Even if exemption from military duty be held to be a privilege and not a constitutional right, discrimination among various religious dissenters is prohibited by the "free" exercise clause of the First Amendment (*Sherbert* v. *Verner*, *supra*). As the Court stated in *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969):

> "The Constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right'. See *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963)."

This was also suggested by the Court of Appeals for the Second Circuit itself when in *Seeger*, *supra*, Judge Kaufman wrote (326 F. 2d 846, p. 851):

> "It could hardly be argued, for example, that the authority of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

This Court has, moreover, recognized the doctrine that there is no legislative power to grant a privilege on unconstitutional conditions. A discriminatory denial of a tax exemption for engagng in speech is a limitation on free speech. (*Speiser* v. *Randall*, 357 U. S. 513 [1958]). In that case the Court held that the burden of showing that petitioners engaged in criminal speech was upon the State and not upon the petitioner. In the case at bar, the "privilege" of exemption is conditioned on a violation of the petitioner's religious conscience. The conscription scheme in practice goes further than a mere shifting of the burden of proof to the defendant. As construed by the Courts below it stripped the petitioner of any defense at all.

A citizen who refuses to register for the draft acts at his peril, since the jury may readily find that the alleged conscientious beliefs which impelled his dereliction were not sincere. It is submitted, however, that the First Amendment, at the very least, consistent with the pronouncements of this Court in *Girouard* and the *Macintosh* dissent as well as *Sherbert* v. *Verner*, *supra*, guarantees to him the right to have the jury pass on the issue when he is on trial for his liberty.

CONCLUSION

It is respectfully prayed that the judgment be reversed and the indictment dismissed; or, in the alternative, that the judgment be reversed and the cause remanded for a new trial.

Dated: New York, New York, December 3, 1969.

Respectfully submitted,

MURRAY I. GURFEIN,
Attorney for Petitioner.

JACOB W. HELLER,
Of Counsel.

APPENDIX

Appendix to Brief

Constitutional Provisions, Statutes and Regulations.

CONSTITUTION

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATUTES

Title 50 U.S.C. App.:

§ 453. Registration

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], it shall be the duty of every male citizen of the United States, and

every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

June 24, 1948, c. 625, Title I, § 3, 62 Stat. 605; June 19, 1951, c. 144, Title I, § 1(c), 65 Stat. 76.

§ 454. Persons liable for training and service

(a) Age limits; training in National Security Training Corps; physical and mental fitness; adequate training facilities; assignment to stations and units; training period; medical specialist categories

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States; *Provided,* That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces; *Provided further, That, notwithstanding any other provision of law, any*

*registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted;** *Provided further,* That any male alien who is between the ages of 18 years and 6 months and 26 years, at the time fixed for registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of ths Appendix], who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title [said sections] if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

• • •

* Italicized portion added in June, 1967 (81 Stat. 100).

§ 462. Offenses and penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classifications, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant

thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on convicition, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts martial under laws in force prior to the enactment of this to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Title 18 U.S.C.

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. As amended Sept. 1, 1964, c. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145, renumbered Sept. 26, 1961, Pub. L. 87-299, § 1, 75 Stat. 648.

PRESIDENTIAL PROCLAMATIONS

Proclamation No. 2799

July 20, 1948, 13 F. R. 4173, 62 Stat. 1531

REGISTRATION

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by title I of the Selective Service Act of 1948 [sections 451-470 of the Appendix], do proclaim the following:

1. The registration of male citizens of the United States and other male persons residing in the United States who shall have attained the eighteenth anniversary of the day of their birth and who shall have not attained the twenty-sixth anniversary of the day of their birth shall take place in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands between the hours of 8:00 A.M. and 5:00 P.M. on the day or days hereinafter designated for their registration, as follows:

(a) Persons born in the year 1922 after August 30, 1922, shall be registered on Monday, the 30th day of August, 1948.

(b) Persons born in the year 1923 shall be registered on Tuesday, the 31st day of August, 1948, or on Wednesday, the 1st day of September, 1948.

(c) Persons born in the year 1924 shall be registered on Thursday, the 2nd day of September, 1948, or on Friday, the 3rd day of September, 1948.

(d) Persons born in the year 1925 shall be registered on Saturday, the 4th day of September, 1948, or on Tuesday, the 7th day of September, 1948.

(e) Persons born in the year 1926 shall be registered on Wednesday, the 8th day of September, 1948, or on Thursday, the 9th day of September, 1948.

(f) Persons born in the year 1927 shall be registered on Friday, the 10th day of September, 1948, or on Saturday, the 11th day of September, 1948.

(g) Persons born in the year 1928 shall be registered on Monday, the 13th day of September, 1948, or on Tuesday, the 14th day of September, 1948.

(h) Persons born in the year 1929 shall be registered on Wednesday, the 15th day of September, 1948, or on Thursday, the 16th day of September, 1948.

(i) Persons born in the year 1930 before September 19, 1930, shall be registered on Friday, the 17th day of September, 1948, or on Saturday, the 18th day of September, 1948.

(j) Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter.

2. (a) Every male citizen of the United States and every other male person residing in the United States other than persons excepted by section 6(a) of title I of the Selective Service Act of 1948 [section 456(a) of this Appendix], who is within any of the several States of the United States, the District of Columbia, the Territoy of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands and who shall have attained the eighteenth anniversary of the day of his birth and who shall have not attained the twenty-sixth anniversay of the day of his birth on the day or any of the days fixed herein for his registration is required to and shall on that day or any of those days present him-

self for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

(b) A person subject to registration may register after the day or days fixed for registration in case he is prevented from registering on that day or any of those days by circumstances beyond his control or because he is not present in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on that day or any of those days. If he is not in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but subsequently enters any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, he shall within five days after such entrance present himself for and submit to registration before a duly designated registration official or selective service local board. If he is in any of the several States of the United States, the District of Columbia, the Territoy of Alaska, the Teritoy of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but because of circumstances beyond his control is unable to present himself for and submit to registration on that day or any of those days he shall do so as soon as possible after the cause for such inability ceases to exist.

3. Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

4. I call upon the Governors of each of the several States, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands and the Board of Commissioners of the District of Columbia, and all officers and agents of the United States and all officers and agents of the several States, the Territories of Alaska and Hawaii, Puerto Rico, the Virgin Islands, and the District of Columbia, and political subdivisions thereof, and all local boards which, and agents thereof who, may be appointed under the provisions of title I of the Selective Service Act of 1948, or the regulations which may be prescribed thereunder, to do and perform all acts and services necessary to accomplish effective and complete registration.

5. In order that there may be full cooperation in carrying into effect the purposes of title I of the Selective Service Act of 1948, I urge all employers and Government agencies of all kinds—Federal, State, territorial and local—to give those under their charge sufficient time in which to fulfill the obligations of registration incumbent upon them under the said Act and this proclamation.

HARRY S. TRUMAN

Proclamation No. 2942

Aug. 30, 1951, 16 F. R. 8969, 65 Stat. c35

REGISTRATION—SUPPLEMENTING PROCLAMATION No. 2799

1. The registration of male citizens of the United States who are required to register by the said Proclamation No. 2799 of July 20, 1948 [set out as a note under this section], shall continue to be accomplished in accordance with the provisions of that proclamation.

2. The registration in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands of male persons who are not citizens of the United States and who are subject to registration under section 3 of title I of the Universal Military Training and Service Act, as amended [this section], shall hereafter be accomplished in accordance with paragraph numbered 3 of this proclamation.

3. (a) The registration of male persons who are not citizens of the United States who shall have attained the eighteenth anniversary of the day of their birth and who shall have not attained the twenty-sixth anniversary of the day of their birth shall take place in the several States of the United States, the District of Columbia, the Territories of Alaska and Hawaii, Puerto Rico, and the Virgin Islands between the hours of 8:00 A.M. and 5:00 P.M. on the day or days hereinafter designated for their registration as follows:

(1) Every person born on or after September 15, 1925, but not after September 14, 1933, shall be registered on Friday, the 14th day of September, 1951, or on any day within the period of six months following the day on which he entered any of the following: The continental United States, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(2) Every person born after September 14, 1933, shall be registered on the day he attains the eighteenth anniversary of the day of his birth, or within five days thereafter, or on any day within the period of six months following the day on which he entered any of the following: The continental United States, the Territory of Alaska,

the Territory of Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(b) Every male person now or hereafter in the United States who is not a citizen of the United States, other than persons excepted by or pursuant to section 6(a) of title I of the Universal Military Training and Service Act, as amended [section 456(a) of this Appendix] and those previously registered pursuant to the said Proclamation No. 2799 of July 20, 1948 [set out as a note under this section], or pursuant to the said Proclamation No. 2938 of August 16, 1951 [set out as a note under this section], who is within any of the several States of the United States, the District of Columbia the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands and who shall have attained the eighteenth anniversary of the day of his birth and who shall have not attained the twenty-sixth anniversary of the day of his birth on the day or any of the days fixed herein for his registration is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days.

(c) If a person subject to registration who is not a citizen of the United States is in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed for registration but because of circumstances beyond his control is unable to present himself for and submit to registration on that day or any of those days he shall do so

as soon as possible after the cause of such inability ceases to exist. If a person subject to registration who is not a citizen of the United States is not in any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, on the day or any of the days fixed herein for the registration of a person of his age but subsequently enters any of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands, he shall present himself for and submit to registration before a duly designated registration official or selective service local board within the period of six months following the day on which he entered any of the following: The continental United States, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, the Virgin Islands and Guam.

(d) Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

HARRY S. TRUMAN.

REGULATIONS

Title 32 C.F.R.

§ 1611.7 Responsibility for performance of duty.

(a) Every person subject to registration is required to familiarize himself with the rules and regulations governing registration and to comply therewith.

(b) Every person who, on the day or one of the days fixed for registration, is required to be registered is per-

sonally charged with the duty of presenting himself before the proper officials and submitting to registration.

(c) The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

(d) Persons required to present themselves for and submit to registration shall not be paid for performing such obligation nor shall they be paid travel allowances or expenses.

Part 1613—Registration Procedures

Place and Time

Sec.

1613.1 Place and time of registration.

Manner of Registration

1613.11 Interview of the registrant.
1613.12 Instructions concerning completion of registration card.
1613.13 Registrant's signature.
1613.14 Certification by registrar.
1613.16 Recalcitrants.

• • •

Authority: The provisions of this Part 1613 issued under sec. 10, 62 Stat. 618, as amended; 50 U.S.C. App. 460.

PLACE AND TIME

§ 1613.1 Place and time of registration.

(a) Any person required to be registered may present himself for and submit to registration at any designated place of registration or at the office of any local board during the hours for registration specified in the Presidential proclamation or during the usual business hours.

(b) All persons waiting to register at any place of registration at the closing hour on the day or the last one of the days fixed for their registration by the Presidential proclamation shall be registered.

[13 F. R. 4535, Aug. 6, 1948. Redesigned at 14 F. R. 5021, Aug. 13, 1949]

MANNER OF REGISTRATION

§ 1613.11 Interview of the registrant.

(a) Every registrant before being registered shall enter his name and place of residence upon one of the numbered lines on the Tally Sheet (SSS Form No. 4). If the registrant is unable to write, the registrar shall print the registrant's name and place of residence on the Tally Sheet (SSS Form No. 4). All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card (SSS Form No. 1) except when the registrant signs the completed card.

(b) The space on the Registration Card (SSS Form No. 1) for the selective service number shall be left blank.

(c) The registrar shall obtain from the registrant and by observation of the registrant the information necessary

to complete the entries on the Registration Card (SSS Form No. 1), and shall enter the information in the proper items of the card. The registrar shall make certain that the registrant fully understands what information is required and if any information given by the registrant is not clear the registrar shall carefully explain to the registrant what information is required and request that it be furnished clearly and correctly.

[13 F. R. 4535, Aug. 6, 1948, as amended by 16 F. R. 9030, Sept. 6, 1961, 28 F. R. 7497, July 24, 1963. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.12 Instructions concerning completion of registration card.

(a) The registrar shall take extreme care that the place of residence of the registrant is correctly entered in item 2 of the Registration Card (SSS Form No. 1). The local board having jurisdiction over the place of residence entered in item 2 of the Registration Card (SSS Form No. 1) shall always have jurisdiction over the registrant, unless otherwise directed by the Director of Selective Service. The registrar shall require the registrant to give sufficient information as to the location of the place of his residence to establish such place within the jurisdiction of a local board. The registrant shall not be permitted to give a place of residence outside of the continental United States, the State of Alaska, the State of Hawaii, Puerto Rico, the Virgin Islands, Guam, or the Canal Zone. In describing his place of residence, the registrant shall give the street number thereof, when used, and in every case he shall give the name of the town, township, village, or city, and the county and State in which it is located. No R.F.D. route number shall be

sufficient unless it is supplemented by more particular information showing where the place of residence is located on the R.F.D. route. The registrant shall be permitted to determine what place he desires to give as his residence when he is not located in the same place all of the time.

(b) The registrar shall enter the mailing address of the registrant in item 5 of the Registration Card (SSS Form No. 1) only when it is not the same as the place of residence entered in item 2. It should be made clear to the registrant that he should give as his mailing address an address normally regarded by him as a permanent address at which he would expect to receive important communications. The registrar shall advise the registrant that a correct mailing address is most important because it is the address to which all notices to the registrant will be sent, and that he must advise his local board each time there is a change in his mailing address.

(c) The registrar, in entering the date of birth of the registrant in item 3 of the Registration Card (SSS Form No. 1), shall use the name of the month or an abbreviation thereof. No numerical designation for the month shall be used.

[Amdt. 77, 23 F. R. 4000, June 24, 1958, as amended by Amdt. 84, 24 F. R. 7693, Sept. 24, 1959]

§ 1613.13 Registrant's signature.

(a) When the provisions of §§ 1613.11 and 1613.12 have been carried out, the registrar shall have the registrant verify the correctness of the enties on the Registration Card (SSS Form No. 1).

(b) The registrant shall then sign his name, exactly as he usually signs it, in the space on the Registration

Card (SSS Form No. 1) provided for his signature. If he cannot sign his name, he shall make his mark, and the registrar shall then write in after the mark the words "The mark of ....., made
(Name of registrant)
in my presence" and shall sign his own name thereunder, followed by the word "Register."

(c) If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card (SSS Form No. 1), and such registrant shall thereby be registered.

[13 F. R. 4535, Aug. 6, 1949. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.14 Certification by registrar.

(a) After the Registration Card (SSS Form No. 1) is signed, the registrar shall note, in the space provided therefor, the registrant's answers which he believes to be incorrect or false, if any. If he does not believe any of the registrant's answers to be incorrect or false, he shall write the word "None" in such space. It is the duty of the registrar to report on the Registration Card (SSS Form No. 1) any answers of the registrant he believes to be incorrect or false.

(b) The registrar shall then sign the certification and fill in the date of registration on the Registration Card (SSS Form No. 1). The registrar should then carefully check the completed Registration Card SSS Form No. 1)

to be sure that every question is correctly answered and that all the answers are complete and legible.

[13 F. R. 4536, Aug. 6, 1948, as amended by Amdt. 71, 23 F. R. 4600, June 24, 1958. Redesignated at 14 F. R. 5021, Aug. 13, 1949]

§ 1613.16 Recalcitrants.

If a registrant refuses to cooperate or is inclined to evade, refuses to answer, or answer falsely, his attention should be called to the penal provisions of title I of the Military Selective Service Act of 1967. If he is still refractory, witnesses should be called and, after the penalty of the law has been explained again to him in the presence and hearing of witnesses, a full opportunity should be given him to reconsider his actions and answer the questions. If he is still refractory, his name and the names of the witnesses should be noted and the case immediately reported to the United States district attorney. The registration should not be obstructed or delayed. Persons attempting to obstruct or delay it should be dealt with promptly and firmly.

[Amdt. 28, 16 F. R. 9030, Sept. 6, 1951, as amended by E. O. 11360, 32 F. R. 9787, July 4, 1967]

§ 1642.3 Compliance with procedures of this part not condition precedent to prosecution.

Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part is not a condition precedent to the prosecution of any person under the provisions of section 12 of title I of the Military Selective Service Act of 1967.

[E. O. 10292, 16 F. R. 9862, Sept. 28, 1951; E. O. 11360, 32 F. R. 9788, July 4, 1967]

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions Presented	2
Statutes and Regulation involved	2
Statement	3
Summary of Argument	5
Argument:	
I. Failure to register for the draft is a continuing offense for purposes of the statute of limitations	10
II. The privilege against self-incrimination is not a defense to a prosecution for failure to register for military service	21
III. There was no error in the trial court's refusal to charge the jury that it had to acquit petitioner if it found that his refusal to register was based on sincerely held religious beliefs	29
Conclusion	34

CITATIONS

Cases:

Albertson v. *Subversive Activities Control Board*, 382 U.S. 70 ..... 22, 24

Bolling v. *Sharpe*, 347 U.S. 497 33

Bramblett v. *United States*, 231 F. 2d 489, (C.A.D.C.), certiorari denied, 350 U.S. 1015 ..... 11, 16, 18, 20

Campbell Painting Corp. v. *Reid*, 392 U.S. 286 27

Canada Packers, Ltd., v. *Atchison, T., & S.F. R. Co.*, 385 U.S. 182 15

Cantwell v. *Connecticut*, 310 U.S. 296 30

373-200—70——1

Cases—Continued

	Page
Chandler v. *United States*, 171 F. 2d 921, certiorari denied, 336 U.S. 918	17
Chaunt v. *United States*, 364 U.S. 360	29
Costello v. *United States*, 365 U.S. 265	29
Fogel v. *United States*, 162 F. 2d 54, certiorari denied, 332 U.S. 791	15
Fowler v. *United States*, 352 F. 2d 100, certiorari denied, 383 U.S. 907	28
Frost Trucking Co. v. *Railroad Commission*, 271 U.S. 583	23
Gara v. *United States*, 178 F. 2d 38, affirmed on other grounds by an equally divided court, 340 U.S. 857	15
Gardner v. *Broderick*, 392 U.S. 273	25
Garrity v. *New Jersey*, 385 U.S. 493	23
Gay v. *United States*, 408 F. 2d 923	28
Grosso v. *United States*, 390 U.S. 62	22
Gruenwald v. *United States*, 353 U.S. 391	16, 17, 18
Hamilton v. *Regents*, 293 U.S. 245	30
Hanf v. *United States*, 235 F. 2d 710, certiorari denied, 352 U.S. 880	17
Haynes v. *United States*, 390 U.S. 85	22
Hoffman v. *United States*, 341 U.S. 479	26
In Re Summers, 325 U.S. 561	31
Jacobson v. *Massachusetts*, 197 U.S. 11	30
Korholz v. *United States*, 269 F. 2d 897	17
Leary v. *United States*, 395 U.S. 6	22, 24
Lichter v. *United States*, 334 U.S. 742	14
Lorenzo v. *Wirth*, 170 Mass. 596	27
Malloy v. *Hogan*, 37 U.S. 1	26
Marchetti v. *United States*, 390 U.S. 39	8, 22, 25, 29
McDonald v. *United States*, 89 F. 2d 128	18
McGregor v. *United States*, 206 F. 2d 583	15
Minor v. *United States*, Nos. 189, 271, this Term, decided on December 8, 1969	25, 29

Cases—Continued

	Page
Morgan v. *United States*, 309 F. 2d 234, certiorari denied, 373 U.S. 917	25
Murphy v. *Waterfront Commission*, 378 U.S. 52	22
Paul v. *United States*, 371 U.S. 245	14
Pendergast v. *United States*, 317 U.S. 412	11
People v. *Gold Key Club, Inc.*, 152 N.Y.S. 2d 669	17
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367	15
Reynolds v. *United States*, 98 U.S. 145	30
Schmerber v. *California*, 384 U.S. 757	27
Selective Draft Law Cases, 245 U.S. 366	30
Sherbert v. *Verner*, 374 U.S. 398	32
Smith v. *United States*, 348 U.S. 147	28
Teague v. *Regional Commissioner of Customs, Region II*, 404 F. 2d 441, certiorari denied, 394 U.S. 977	24
United States v. *Bendik*, 220 F. 2d 249	21
United States v. *Benjamin*, 328 F. 2d 854, certiorari denied, *sub nom. Howard* v. *United States*, 377 U.S. 953	18
United States v. *Cores*, 356 U.S. 405	11
United States v. *Franklin*, 188 F. 2d 182	17
United States v. *Guertler*, 147 F. 2d 796	15
United States v. *Haskell*, 327 F. 2d 281, certiorari denied, 377 U.S. 945	17
United States v. *Irwine*, 98 U.S. 450	16
United States v. *Johns-Manville Corp.*, 213 F. Supp. 65	17
United States v. *Kauten*, 133 F. 2d 703	31
United States v. *Macintosh*, 283 U.S. 605	30
United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U.S. 664	17
United States v. *Midstate Co.*, 306 U.S. 161	16, 18

Cases—Continued Page
United States v. *Mersky*, 361 U.S. 431 14
United States v. *Nugent*, 346 U.S. 1 33
United States v. *O'Brien*, 391 U.S. 367 ..... 5, 12, 24, 27, 30
United States v. *Palmer*, 223 F. 2d 843, certiorari denied, 350 U.S. 873 21
United States v. *Rickenbacker*, 309 F. 2d 462, certiorari denied, 371 U.S. 962 25
United States v. *Socony Vacuum Oil Co.*, 310 U.S. 150 16
United States v. *Sullivan*, 274 U.S. 259 24
United States v. *Universal Corp.*, 344 U.S. 218 .. 11, 16, 19
United States v. *Walden*, 411 F. 2d 1109 25
Walker v. *City of Birmingham*, 388 U.S. 307 .. 32
Zemel v. *Rusk*, 381 U.S. 1 ..... 6, 15

Constitution, statutes, proclamations and regulations:
United States Constitution:
Art. I, Sec. 8 30
First Amendment 9, 30, 31, 32
Fifth Amendment 26, 30
Criminal Appeals Act of 1948 15
Marihuana Tax Act (26 U.S.C. 4742, 4744a) .. 23
Military Selective Service Act of 1967 ..... 16, 33
National Firearms Act 23
Selective Training and Service Act of 1940 15
Subversive Activities Control Act 23
Universal Military Training and Service Act .. 5, 15
18 U.S.C. 1001 16
18 U.S.C. 3282 ..... 3, 4, 5, 10, 14
18 U.S.C. 3731 14
18 U.S.C. 4208 3
26 U.S.C. 4401 23
26 U.S.C. 4411 23

Constitution, statutes, etc.—Continued

	Page
26 U.S.C. 4412	23
28 U.S.C. 1254(1)	2
50 U.S.C. App. 453	2, 5, 6, 10, 11, 13
50 U.S.C. App. 454(a)	2, 6, 13
50 U.S.C. App. 456(a)	12
50 U.S.C. App. 460	14
50 U.S.C. App. 462(a)	3
50 U.S.C. 456(j)	33
50 U.S.C. (456(k)	8 12
Presidential Proclamation No. 2799, issued July 20, 1948	10
32 C.F.R.:	
1611.2	12
1611.6	20
1611.7	3, 6, 11
1613.11	24
1613.13	24
1617.1	13
1621.11	33
1622.11	33
1622.14	33
1623.5	13
1625.1	12
1625.2	12
1625.3	12
1625.4	12
1625.11	12
1641.3	13
1641.7	13
1642.2	12
1660.1	33
1660.10	33
1660.20	33
1660.21	33
1660.30	33
1660.31	33

Miscellaneous:

Page

Comment, 34 U. Chi. L. Rev. 79 (1966)..... 32

Legal Aspects of Selective Service, pp. 46–47 (1969 rev.)..... 29

Mansfield, *The Albertson Case; Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Supreme Court Review 103, 130–131..... 26

United States Selective Service System, *Selective Service Manual* (1945), Section 611.5(d)..... 14

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 441

ROBERT I. TOUSSIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 299–309)[1] is reported at 410 F. 2d 1156. The memorandum opinion of the district court (App. 37–47) is reported in part at 280 F. Supp. 473.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969 (App. 310). The petition for a writ of certiorari was filed on August 7, 1969, and was

[1] "App." refers to the printed Appendix. "R." preceded by the volume number refers to the four-volume trial transcript on file with the Clerk of this Court.

granted on October 20, 1969 (App. 311). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether failure to register for the draft was a continuing offense, for the purpose of the statute of limitations, until the time petitioner attained the age of twenty-six.

2. Whether, after the initial failure to register, subsequent registration was not required because such late registration might have been self-incriminatory.

3. Whether the trial court erred in declining to instruct that conscientious objection was a defense to a charge of failure to register.

STATUTES AND REGULATION INVOLVED

Section 3 of the Universal Military Training and Service Act, 65 Stat. 76 (50 U.S.C. App. 453), provides:

> Except as otherwise provided in this title it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Section 4 of the Military Selective Service Act of 1967, 81 Stat. 100 (50 U.S.C. App. 454), provides in pertinent part:

* * * * *

* * * That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted: * * *

* * * * *

18 U.S.C. 3282 provides:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed:

32 C.F.R. 1611.7(c) provides:

The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.[2]

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of knowingly and willfully evading and refusing registration with the Selective Service System in violation of 50 U.S.C. App. 462(a). On November 29, 1968, he was sentenced pursuant to 18 U.S.C. 4208(b), with final fixing of the sentence stayed

[2] These, and additional statutory and regulatory provisions, are set forth in the appendix to petitioner's brief.

pending appeal. The court of appeals affirmed (App. 299–309).

The evidence is undisputed that petitioner not only did not register for the draft in 1959, on reaching his eighteenth birthday, but that he never registered at any time thereafter (App. 77, 98, 161, 176–177; 1 R. 87, 138, 140; 2 R. 280, 310). In February 1967, he was arrested as a draft law violator (App. 102–103; 1 R. 151).

Before trial, petitioner claimed that since his initial failure to register had occurred in 1959, his 1967 indictment and trial were barred by the running of the five-year statute of limitations (18 U.S.C. 3282). The district court denied the motion. The court ruled that petitioner's offense in failing to register was a continuing one and that petitioner had remained under a duty to present himself for registration as long as he was liable for service in the Armed Forces, until age twenty-six, when the statute of limitations commenced to run (App. 38–39).[3] The district court also rejected the pre-trial claim that petitioner was excused from registering after he had failed to do so at age eighteen because "his later registration is

[3] Petitioner was arrested with his thirty-three year old brother and both were charged with failing to register. The district court ruled that as to the brother, the statute of limitations had run as more than five years had elapsed since his obligation to register had terminated at age twenty-six (App. 38–40). As petitioner notes (Pet. Br. 7), the government has acquiesced in the order of dismissal relating to petitioner's brother. Petitioner, however, was born June 23, 1941, and was not yet twenty-six when he was indicted on May 4, 1967, so that the statute of limitations had not even begun to run in his case.

a self-accusatory act which, therefore, he cannot be required to perform" (App. 40–41).

At trial, petitioner claimed to be a conscientious objector whose scruples would not permit him to "even take the first step of registration" (App. 176–178, 238; 2 R. 310–312; 3 R. 432; 437), and caused him to oppose also the performance of civilian service in lieu of military training (App. 241; 3 R. 443). The trial court instructed that petitioner's motive, idealism and philosophy were immaterial, except as aids in determining intent and mental capacity (App. 134–135; 286–287; 2 R. 233–234; 4 R. 589–590).

SUMMARY OF ARGUMENT

I

Section 3 of the Universal Military Training and Service Act (50 U.S.C. App. 453) essentially requires all males between the ages of eighteen and twenty-six to register for the draft. It is our position that this provision imposes a continuing duty to register until age twenty-six. Thus, we submit that petitioner is in error when he asserts that the offense was complete when he failed to register at age eighteen in 1959, and that since more than five years elapsed from that date until the return of the indictment in 1967, the applicable statute of limitations (18 U.S.C. 3282) barred the instant prosecution.

As this Court made clear in *United States* v. *O'Brien,* 391 U.S. 367, the success of our system of conscription for military service depends on the continuing cooperation of all males subject to its reach. Moreover,

both the Act and the regulations in a variety of contexts make plain that there is this continuing duty of cooperation. The fact that Congress in express terms provided in 50 U.S.C. App. 454 that registrants who have failed or refused to report for induction have a continuing obligation to report, hardly shows a congressional intent that violation of the registration requirements of 50 U.S.C. App. 453 should not be treated as a continuing offense. On the contrary, Congress obviously intended these two intertwined provisions to be read *in pari materia.*

Moreover, that registration should be treated as a continuing duty is confirmed by the applicable regulation (32 C.F.R. 1611.7(c)) which, in express terms, imposes a continuing obligation in this regard. This regulation has been in force for a substantial period of time during which Congress has been aware of its existence. It should be adhered to as reflecting a proper interpretation of the law. See, *e.g., Zemel* v. *Rusk,* 381 U.S. 1, 11.

Our view of the statutory obligation to register as a continuing one finds full support in the continuing offense doctrine. The basic difference between a continuing offense and an instantaneous act of criminality is that the former involves a continuous course of conduct, impelled by a single impulse, to achieve an ultimate unlawful objective. Petitioner's intentional failure to register over a period of years fits this rationale since his ultimate objective would not have been achieved simply by failing to register at age eighteen. In order to escape military service, his failure to register had to continue during the entire period of his statutory eligibility.

There are no other reasons for rejecting the continuing offense theory in this case. There are no double jeopardy problems since the government could not make out a separate offense for each day a defendant failed to register. Moreover, petitioner raises a wholly unrealistic claim by urging that under our theory "a person seventy years old can be prosecuted for having failed to register fifty-two years before at the age of eighteen" (Pet. Br. 17). The district court in this very case dismissed an indictment against petitioner's thirty-three year old brother, ruling that the statute of limitations had run as to him since more than five years had elapsed since he reached age twenty-six, and the government acquiesced in that interpretation by not seeking further review.

II

The privilege against self-incrimination is no defense to the instant prosecution. The *Marchetti-Grosso* line of cases dealt with the *initial* failure to register under statutory schemes, in an area permeated with criminal statutes, which posed a Hobson's choice: if the person covered by the scheme failed to register he would be subject to prosecution under the statute commanding registration; if he did register, however, there was a substantial danger that the information provided by him would subject him to prosecution under other criminal statutes.

The statutory scheme involved here is entirely different in that it involves a regulatory and essentially neutral area of inquiry. As such, it does not create a

"real and appreciable" danger of self-incrimination. *Marchetti* v. *United States,* 390 U.S. 39, 48. Nor was petitioner faced with the dilemma faced by the potential registrants involved in th *Marchetti-Grosso* line of cases. As the court of appeals pointed out, petitioner's inaction following his initial failure to register "did not give rise to the threat of punishment beyond that he had already risked" (App. 307).

Petitioner's argument essentially comes down to the claim that one who has failed to comply with the law (as petitioner did when he failed to register at age eighteen) can refuse to comply thereafter (as petitioner failed to do) on the theory that for him to register would reveal his earlier violation. The privilege against self-incrimination has never been given such a sweeping scope. Indeed, under such a rationale any regulatory scheme requiring periodic registration or reporting could be rendered unworkable since one who failed to provide the required information at one point in time could refuse to do so subsequently on the ground that to do would incriminate him for his earlier failure.

At all events, belated registration for the draft would not have been a self-incriminatory act; on the contrary, it would have tended to negate the necessary element of willfulness to support a conviction for the earlier offense. Indeed, in most cases it is fair to say that a male who willfully fails to register at age eighteen, but thereafter does register and evinces

a willingness to perform his military obligation, will not normally be prosecuted for his preexisting violation.

III

The trial court properly refused to instruct the jury that it had to acquit petitioner if it believed that his failure to register was the product of a sincere and conscientious belief.

It has long been recognized that exemption from military training on grounds of conscientious objection is not compelled by the Constitution. Hence, the requirement of registration *per se* does not even raise a First Amendment question; much less does it impose an impermissible burden on the right of untrammeled religious belief. In short, even if it be assumed that petitioner was a conscientious objector—a claim that he chose not to submit to the draft board for examination—no impermissible burden was placed upon his freedom of conscience in requiring that he perform the simple act of registration.

Nor is it an invidious discrimination to require one to undergo a readily available, non-burdensome procedure for determination of entitlement to conscientious objector status. Having failed to take advantage of this available procedure, petitioner should not be heard to complain that many of those who have done so have been granted that status.

ARGUMENT

I

FAILURE TO REGISTER FOR THE DRAFT IS A CONTINUING OFFENSE FOR PURPOSES OF THE STATUTE OF LIMITATIONS

Petitioner contends that the instant prosecution was barred by the pertinent statute of limitations (18 U.S.C. 3282, *supra*, p. 3) because more than five years elapsed between his failure to register on his eighteenth birthday in 1959 and the return of the indictment in 1967.[4] His argument, in short, is that the offense of non-registration was complete at the time of his initial failure to comply in 1959[5] and that he had no duty to register any time thereafter. It is the government's position that registration for military service is a continuing duty; that one who fails to register at age eighteen is not excused from compliance thereafter but has a persisting obligation to register at least until reaching age twenty-six; and hence that the statute of limitations as to the offense of non-registration does not commence to run until after the registrant has reached his twenty-sixth birthday.

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[4] Petitioner's failure to register was first discovered by his local board through an anonymous "tip" (see App. 76–77). He was arrested on this charge on February 3, 1967 (App. 102–103), and the indictment was returned on May 3, 1967 (App. 5). He reached his twenty-sixth birthday on June 23, 1967.

[5] Presidential Proclamation No. 2799, issued July 20, 1948, under the express authority of 50 U.S.C. App. 453, thus provides in pertinent part: "Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter" (see Pet. Br. App. 7).

The duty to register is prescribed by Section 453 (50 U.S.C. App. 453). Under it, eligible persons are required to submit themselves

> to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

The regulation so prescribed provides (32 C.F.R. 1611.7(c)):

> The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

1. We begin with the established proposition that whether an offense is a continuing one or not is entirely a matter of statutory interpretation. See, *e.g., United States* v. *Cores,* 356 U.S. 405; *Pendergast* v. *United States,* 317 U.S. 412, 419–421; *Bramblett* v. *United States,* 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015. The inquiry is much like that followed in determining the "unit" of the offenses. See, *e.g., United States* v. *Universal Corp.,* 344 U.S. 218, 224. Here, we submit, an examination of the congressional intent underlying the provision involved demonstrates that the explicit provision of the regulation validly reflects that petitioner's obligation to register for the draft was a continuing one until he attained age twenty-six and, correspond-

ingly, that his failure to perform that duty was a continuing offense.

Thus, Congress has provided for a continuing process of cooperation, classification, and impartial selection, with registration being but a necessary first step. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 381. The statutory provisions and the regulations adopted to implement the Selective Service System reflect the concept that continuing duties are essential if the system is to respond successfully to continually changing circumstances. Illustrations may be found in the fact that even as to the narrow class of persons who are exempted from registration itself, that exemption is not permanent, but terminates "after the cause therefor ceases to exist" (50 U.S.C. App. 456(k)); [6] initial classification of a registrant is not necessarily permanent; [7] on the contrary, if, in the period before induction, a registrant's status changes in a relevant manner he may be reclassified.[8] This obviously requires that a registrant keep a draft board regularly advised of all information necessary for efficient and prompt action in regard to his draft status, a duty which the regulations make explicit.[9]

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[6] Those exempted from registration include males already in the military service, members of reserve units, students enrolled in the service academies, foreign diplomats and other special classes of aliens (see 50 U.S.C. App. 456(a); 32 C.F.R. 1611.2, 1642.2.)

[7] See 32 C.F.R. 1625.1.

[8] See 32 C.F.R. 1625.2, 1625.3, 1625.4, 1625.11.

[9] For example, registrants are required to keep their registration and classification certificates in their "personal possession

Petitioner seeks to overcome the fact that the statutory and regulatory framework is characterized by continuing obligations by arguing (Pet. Br. 13) that if Congress had intended that there be a continuing duty to register under 50 U.S.C. App. 453 it would have said so explicitly. In support, he points to 50 U.S.C. App. 454, which does in express terms impose a continuing duty on registrants who have failed or refused to report for induction "to remain liable for induction and when available shall be immediately inducted." [10] But the analogy is misleading. Failure to report for the last step in the process does not have the inherent quality of continuity which would naturally pertain to the first step of what is known to be the continuing process of selection. Thus, Congress might have thought it necessary to be explicit as to the duty to report while finding it unnecessary to do so as to the failure to register.

Sections 453 and 454 are necessarily interrelated provisions and must fairly be read *in pari materia*. By making clear in Section 454 that those males already registered have a continuing duty to submit them-

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at all times". See 32 C.F.R. 1617.1 (registration certificate); 32 C.F.R. 1623.5 (classification certificate).

See also 32 C.F.R. 1641.7, which provides, in relevant part, that "[i]t shall be duty of every classified registrant to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address * * *." See also 32 C.F.R. 1641.3, imposing upon each registrant the duty "to keep his local board advised at all times of the address where mail will reach him".

[10] This provision was added to Section 454(a) by the Military Selective Service Act of 1967, enacted June 30, 1967, 81 Stat. 100, about two months after the return of the indictment in this case.

selves to induction even after an initial failure to comply with an order to report, Congress must have also intended that those upon whom this continuing duty would have to fall—*i.e.*, those required to register—would also be subject to a continuing duty to place themselves within the manpower pool.

Petitioner argues that this regulation is *ultra vires* and can have no effect since it is not a "law" within the exception proviso of the statute of limitations (Pet. Br. 19–24).[11] This argument begs the question since, on our submission, it is the Selective Service Act itself which makes registration a continuing duty; the regulation merely spells out an intent already inherent in the statutory scheme. At all events, the power to implement the laws pertaining to the selective service process is given to the President (50 U.S.C. App. 460), and regulations adopted pursuant to such power have the force of law. See *Lichter* v. *United States*, 334 U.S. 742, 785; *Paul* v. *United States*, 371 U.S. 245, 255; compare *United States* v. *Mersky*, 361 U.S. 431, holding that a regulation intertwined with a statute is a "statute" for the purposes of the Criminal Appeals Act (18 U.S.C. 3731).

The instant regulation, moreover, has a long history.[12] The lower courts have consistently recognized

[11] The statute of limitations (18 U.S.C. 3282) provides in pertinent part that "[*e*]*xcept as otherwise expressly provided by law*, no person shall be prosecuted * * * unless the indictment is found * * * within five years next after such offense shall have been committed" (see Pet. Br. App. 5; emphasis added).

[12] See Section 611.5(d) of United States Selective Service System, Selective Service Manual (1945).

that it properly implements the statutory scheme by expressly making the duty to register a continuing one. See *Fogel* v. *United States*, 162 F. 2d 54, 55 (C.A. 5), certiorari denied, 332 U.S. 791; *McGregor* v. *United States*, 206 F. 2d 583, 584 (C.A. 4); *United States* v. *Guertler*, 147 F. 2d 796 (C.A. 2); *Gara* v. *United States*, 178 F. 2d 38, 40 (C.A. 6), affirmed on other grounds by an equally divided court, 340 U.S. 857. In these circumstances, it is wholly proper to apply here the settled rule that the "interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute." *Zemel* v. *Rusk*, 381 U.S. 1, 11; see also *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Canada Packers, Ltd.* v. *Atchison, T., & S.F.R. Co.*, 385 U.S. 182, 184. Of course, the statute might be more explicit, but it doubtless seemed unnecessary to put into statutory language a regulation which Congress had left untouched through various statutory revisions.[13]

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[13] As noted, such a regulation was in existence as early as 1945 (see *supra* p. 14, n. 12). The Selective Training and Service Act of 1940 (54 Stat. 885), the conscription statute in effect during World War II, was expressly reenacted in 1946 except as to specified provisions (Act of June 29, 1946, § 1, 60 Stat. 341). The 1946 Act expired by operation of law on March 31, 1947 (§ 7, 60 Stat. 342), but fifteen months later Congress reactivated the draft with the enactment of the Selective Service Act of 1948 on June 24 of that year (62 Stat. 604). In 1951, the 1948 Act was broadly amended and redesignated the Universal Military Training and Service Act (65 Stat. 75). In

2. Our conclusion is entirely consistent with accepted legal principles regarding continuing offenses. A continuing offense has been defined as "a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." *United States* v. *Midstate Co.*, 306 U.S. 161, 166; see also *United States* v. *Universal Corp.*, 344 U.S. 218, 224. In instantaneous crimes (*e.g.*, embezzlement or bank robbery) the criminal objective is speedily attained. With respect to continuing offenses, however, the aim is not achieved by a single illegal act; a pattern of illegal behavior is normally required to achieve the ultimate objective.[14] Indeed, any course of conduct, designed or required to accomplish the final criminal objective by stages or by waiting, may result in a continuing offense. See *United States* v. *Socony Vacuum Oil Co.*, 310 U.S.

1967, the Act was again substantively revised and renamed the Military Selective Service Act of 1967 (81 Stat. 100).

In none of these revisions did Congress, obviously aware of its existence, suggest that it deemed the regulation in question at odds with the statutory purpose.

[14] For example, in *Bramblett* v. *United States*, 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015, it was held that falsification of payroll authorization under 18 U.S.C. 1001 was properly charged as a continuing crime since the scheme involved a pattern of conduct, rather than the individual acts which merely exemplified that pattern. See also *Grunewald* v. *United States*, 353 U.S. 391. Compare, however, *United States* v. *Irvine*, 98 U.S. 450, where the offense—embezzlement of funds by an attorney from his client—was essentially completed even though the injury to the client persisted over the years. Any other result, this Court concluded in *Irvine*, would mean that even after twenty years of withholding of the funds the crime would continue, with attendant great difficulties of proof (see 98 U.S. at 452).

150, 253 (conspiracy to restrain trade); *Chandler* v. *United States,* 171 F. 2d 921, 936–937 (C.A. 1), certiorari denied, 336 U.S. 918 (treason); *United States* v. *Manton,* 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664 (obstruction of justice); *Hanf* v. *United States,* 235 F. 2d 710 (C.A. 8), certiorari denied, 352 U.S. 880 (repeated failure to file reports); *Korholz* v. *United States,* 269 F. 2d 897, 899 (C.A. 10) (violation of the Taft-Hartley Act by the continuing guarantee by a corporate official of a bank loan made to an official of a labor union); *United States* v. *Franklin,* 188 F. 2d 182 (C.A. 7) (failure to register under the Alien Registration Act).[15]

When the objective toward which the criminal pattern is directed has been achieved, or when the objective is thwarted short of fruition by governmental discovery, the statute of limitations begins to run. *Grunewald* v. *United States, supra,* 353 U.S. 391, 406; *United States* v. *Johns-Manville Corp.,* 213 F. Supp. 65, 68–69 (E.D. Pa.); *People* v. *Gold Key Club, Inc.* 152 N.Y.S. 2d 669, 673. Of course, that precise point of completion is not ascertainable by any litmus paper test. It depends rather upon the nature of the objective and the means employed to reach that objective

[15] Petitioner's attempted analogy to the offense of failing to file an income tax return (Pet. Br. 15) is inapt. In many instances, at least, the failure to file a tax return is the final rather than the initial act of achieving the unlawful objective. Moreover, a scheme or course of conduct involving income taxes over a period of years may be a continuing offense. *Grunewald* v. *United States, supra,* 353 U.S. 391, 411; *United States* v. *Haskell,* 327 F. 2d 281 (C.A. 2), certiorari denied, 377 U.S. 945.

in each particular case. See *Grunewald* v. *United States, supra,* 353 U.S. 391, 410–411; *McDonald* v. *United States,* 89 F. 2d 128, 133 (C.A. 8).

The instant case falls within the continuing offense rationale. Just as Congress desired to impose a long-term registration requirement on men in petitioner's category, so it was petitioner's objective to avoid compliance with that long-term duty. His objective was not served simply by his failure to register at age eighteen;[16] it required his continued failure to register at any time thereafter until he reached age twenty-six. His own trial testimony unequivocally shows that his overall objective was to continue to avoid registration, classification and any possible military service that might flow therefrom (see App. 161–163, 177–178, 236–239, 241–242). This aim—as the indictment properly charged—involved a studied course of evasion over a period of years (see App. 5). Quite clearly, therefore, petitioner was engaged in "a continuous, unlawful act or series of acts set on foot by a single impulse [evasion of his draft obligation] and operated by an unintermittent force," until his duty to register lapsed. See *United States* v. *Midstate Co., supra,* 306 U.S. 161, 166. This course of conduct was properly regarded as constituting a continuing offense.[17]

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[16] Failure to register at age eighteen was the first essential step in the overall scheme, akin to an early step in a continuing crime such as mail fraud. See *United States* v. *Benjamin,* 328 F. 2d 854, 864 (C.A. 2), certiorari denied *sub nom. Howard* v. *United States,* 377 U.S. 953.

[17] An indictment and a conviction may be based on the continuing scheme of one person, just as well as on a continuing conspiracy of more than one. *Bramblett* v. *United States,* 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015.

3. Petitioner seeks to escape the continuing offense doctrine by raising what he terms "hard questions" which he says would flow from application of this rule in the draft field. These, he alleges, include the question of the time of the completion of the offense, lack of any time limits within which prosecution would have to be instituted and alleged problems of double jeopardy (Pet. Br. 16–18). These are, however, unreal considerations.

The fact that petitioner could not defend against the present indictment by alleging that it was returned after he reached twenty-three does not show that his criminal conduct ceased once he had passed the initial registration period, after reaching age eighteen. If anything, it simply establishes that, as with all continuing offenses, prosecution may fairly take place when the government discovers the wrongdoing—*i.e.*, at any time before the objective is achieved—or within five years after the illegal end is attained—*i.e.*, within five years after petitioner reached age twenty-six.

The contentions regarding alleged problems of fragmentation of the offense and of double jeopardy are equally groundless. Obviously, the government could not make out a separate offense for each day a defendant failed to register (see App. 304a). In construing a criminal statute doubts should be resolved in favor of a construction that avoids the subjection of an offender to multiple convictions by reason of a single unified pattern of behavior even though the behavior continues over a period of time. See *United States* v. *Universal Corp., supra,* 344 U.S. 218; *Bram-*

blett v. *United States*, 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015. The manifest purpose of the present statute is to impose a continuing duty to register on those falling within specified age limits. The failure to register, although of a continuing nature, stems from this single impulse and may thus be the subject of only a single prosecution. Indeed, as the court below pointed out, this is confirmed by this very case "since the indictment here charged only one offense—wilfull failure to register over a lengthy period of time" (App. 304).

Petitioner raises a "straw-man" by further urging that under the continuing offense theory "a person seventy years old can be prosecuted for having failed to register fifty-two years before at the age of eighteen" (Pet. Br. 17). The district court in this very case dismissed an indictment against petitioner's thirty-three year old brother, ruling that the statute of limitations had run as to him since more than five years had elapsed since his obligation of service had terminated at age twenty-six (App. 38–40). The government has not appealed from that decision.

Finally, there is no "dilemma" (Pet. Br. 18) posed by the example of a convicted non-registrant who, upon his release from confinement is only twenty-two and continues to refuse to register and thus subjects himself to another prosecution. Under the regulations, such an offender would be registered on the day he was released from prison (see 32 C.F.R. 1611.6;[18]

[18] This provision reads as follows: "Unless he has already been registered, every person subject to registration who is an inmate of

United States v. *Palmer*, 223 F. 2d 893, 894 (C.A. 3), certiorari denied, 350 U.S. 873), and thus could not again be prosecuted for failure to register.[19]

This case presents only the question whether an eligible male has under existing law a continuing duty to register after he attains the age of eighteen until he reaches the age of twenty-six. If the offense is a continuing one, prosecution is not barred by the running of the statute of limitations until five years after his twenty-sixth birthday.

II

THE PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT A DEFENSE TO A PROSECUTION FOR FAILURE TO REGISTER FOR MILITARY SERVICE

Petitioner argues that if we are correct in our view that failure to register is a continuing offense which tolls the statute of limitations, then a "serious constitutional question" is posed involving the privilege against self-incrimination (Pet. Br. 24). He states this problem as follows: "If it is held that one has a

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an insane asylum, jail, penitentiary, reformatory, or similar institution shall be registered on the day he leaves the institution."

[19] *United States* v. *Bendik*, 220 F. 2d 249 (C.A. 2), relied on by the petitioner dealt with the question of double jeopardy for a failure *to report for induction* and involved a defective first indictment which alleged a refusal to report on a certain date in 1951. The second indictment correctly alleged the date to be in 1952. No continuing course of conduct was asserted. The court of appeals held that if two orders had been issued, in 1951 and 1952, two separate offenses would have been committed and that the abortive first trial therefore was not a bar to the second.

continuing *duty* to register, under penalty of criminal sanction, registration at any time after the date first required therefor is tantamount to compelling an admission of criminal culpability for prior failure to register" (*ibid.;* emphasis in original). Petitioner concludes that the statutory framework thus makes him as "vulnerable to prosecution" (Pet. Br. 25) as were the defendants in the *Marchetti-Grosso* line of cases.[20] The reasons articulated in the cases relied upon have no application here; on the contrary, the values which the privilege against self-incrimination helps to protect (see, *e.g., Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55) would be distorted, not furthered, by the acceptance of petitioner's argument.

1. The contention that the privilege is applicable in the present context under the *Marchetti-Grosso* line of cases stretches the rationale of those cases beyond anything suggested in those decisions. The duty required of petitioner here differed in a fundamental way from the duties imposed on the potential registrants dealt with in *Albertson, Marchetti, Grosso, Haynes,* and *Leary.* The inhibition on the privilege in those cases essentially stemmed from the fact that the *initial* registration might well serve to incriminate the person required to register with respect to other crimes. The governmental schemes involved in those cases were thus "designed primarily for and utilized to pierce the anonymity of citizens engaged in criminal activ-

[20] *Marchetti* v. *United States,* 390 U.S. 39; *Grosso* v. *United States,* 390 U.S. 62; *Haynes* v. *United States,* 390 U.S. 85; *Leary* v. *United States,* 395 U.S. 6; *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70.

ity * * *." *Grosso* v. *United States*, 390 U.S. 62, 72, 76 (concurring opinion of Mr. Justice Brennan).

The statutory scheme in *Albertson* (under the Subversive Activities Control Act of 1950, 64 Stat. 993–994) required that Communist party members file with the Attorney General information regarding their membership. Failure to register would "risk onerous and rapidly mounting penalties" as well as the danger of prosecution (382 U.S. at 76); on the other hand, registration could be used to prosecute the registrant under a variety of other statutes (see 382 U.S. at 77–78). *Marchetti* and *Grosso* involved prosecutions for failure to register and pay the excise tax under the wagering tax provisions (see 26 U.S.C. 4401, 4411, 4412), where such registration would have revealed information entailing the "real and appreciable" danger of criminal prosecution (see *Marchetti*, 390 U.S. at 48). Precisely the same dilemma was involved in the *Haynes* and *Leary* registration schemes.[21] In sum, under all of these statutory frameworks the potential registrant was faced with a "choice between the rock and the whirlpool"[22]: if he failed to register he was subject to prosecution under the statute commanding registration; if he did register there was a substantial risk that the information he provided would subject him to prosecution under

[21] *Haynes* involved registration under the National Firearms Act (26 U.S.C. 5851), and *Leary* involved the requirement under the Marihuana Tax Act that a transferee of marihuana obtain a written order form before transferring marihuana (see 26 U.S.C. 4742, 4744a).

[22] *Garrity* v. *New Jersey*, 385 U.S. 493, 496, quoting from *Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 593.

other criminal statutes. Compounding this Hobson's choice was the fact that the statutory schemes were aimed "at a highly selective group inherently suspect of criminal activities," dealt with "an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime" (*Albertson* v. *Subversive Activities Control Board, supra* 382 U.S. at 79), and where either compliance or non-compliance "created a 'real and appreciable' hazard of incrimination." *Leary* v. *United States*, 395 U.S. 6, 18.

The statutory scheme involved here is of a different cast. It involves a regulatory and essentially neutral area of inquiry. The obligation to register extends to all males within the specified age limits (*United States* v. *O'Brien*, 391 U.S. 367, 372), and, in substance, the inquiries are "neutral on their face and directed at the public at large * * *" (*Albertson, supra*, 382 U.S. at 79;[23] see also *United States* v. *Sullivan*, 274 U.S. 259). Providing information in such circumstances is no different in nature than complying with the requirements contained in many other governmental regulatory schemes.[24] The registration requirements of

[23] The information required of a registrant, insofar as here pertinent, includes his name, place of residence, date of birth and his signature (see 32 C.F.R. 1613.11–1613.13).

[24] The requirement that "neutral" information be provided in regulatory non-criminal areas has been repeatedly upheld by the courts. See, *e.g.*, *Teague* v. *Regional Commissioner of Customs, Region II*, 404 F. 2d 441 (C.A. 2), certiorari denied, 394 U.S. 977 (obtaining a license in order to receive packages sent

the present statute thus do not create "real and appreciable," as opposed to "merely 'imaginary and unsubstantial,' hazards of self-incrimination." *Marchetti* v. *United States*, 390 U.S. 39, 48; *Minor* v. *United States*, No. 189, this Term, decided December 8, 1969.

Another critical distinction is that petitioner was not caught in the same dilemma that faced the defendants in these other cases. As noted, those potential registrants were faced with the choice of incriminating themselves if they registered or risking criminal prosecution for failure to register if they did not. Cf. *Gardner* v. *Broderick*, 392 U.S. 273, 277. Here, however, as the court of appeals pointed out, petitioner's "inaction did not give rise to the threat of punishment beyond that he had already risked. The Government has conceded that only one offense is committed by failing to register between the ages of 18 and 26, and its actions have been consistent with its words. [Petitioner] was indicted for and convicted of only one offense—failing to register on his 18th birthday or at any time. By doing nothing—as indeed was his course—Toussie was not being put to a cruel choice that the privilege is designed to avoid" (App. 307).

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from hostile nations); *United States* v. *Rickenbacker*, 309 F. 2d 462 (C.A. 2), certiorari denied, 371 U.S. 962 (census questionnaire); *United States* v. *Walden*, 411 F. 2d 1109, 1114 (C.A. 4) (distillery registration); *Morgan* v. *United States*, 309 F. 2d 234, 237 (C.A.D.C.), certiorari denied, 373 U.S. 917 (purported attorney's duty to disclose his true name, identity and the fact of his non-admission to the bar).

2. Viewed against this background, petitioner's argument necessarily reduces itself to the assertion that he may justifiably invoke the privilege because *his* own dereliction—*i.e.*, failure to register at age eighteen—has placed him within the " 'selective group inherently suspect of criminal activities' "—*i.e.*, those who have failed to register on time and have a continuing duty to register. This argument appears to mean that where one has failed to comply with the law (as petitioner did when he failed to register at age eighteen) he can refuse to comply thereafter on the theory that for him to register would reveal his earlier violation.

On this reasoning, it would presumably follow that a person could excuse his failure to pay income tax for a particular year on the ground that payment might disclose that he had failed to file a return the prior year—a separate crime. Again, it would also appear to follow that one who failed to obtain or renew a driver's license in one year would have a complete defense for his failure to procure a permit in any subsequent year or years, for to do so might provide a "link in the chain of evidence" establishing the earlier dereliction. See *Malloy* v. *Hogan*, 378 U.S. 1, 11–12; *Hoffman* v. *United States*, 341 U.S. 479, 486–487. This stretches the Fifth Amendment not only far beyond its terms but also farther than it has been stretched in any other case.[25]

[25] Petitioner's reliance (Pet. Br. 32–33) on Professor Mansfield's article in the 1966 issue of the Supreme Court Review (*The Albertson Case; Conflict Between the Privilege Against Self Incrimination and the Government's Need For Informa-*

Perhaps the most apt analogy indicating the length petitioner's theory takes him relates to the very framework of the Selective Service System itself. In *United States* v. *O'Brien,* 391 U.S. 367, this Court determined that the requirement that a registrant have his Selective Service certificate continuingly available was vital to the proper functioning of the Selective Service system (see 391 U.S. at 378–381). Yet under petitioner's argument this ruling could be rendered meaningless. A registrant could thus willfully burn his draft card and immunize himself from obtaining another one. In other words, by invoking the privilege a person could fully immunize himself from the requirement that he carry a draft card, though this is a requirement which the Court in *O'Brien* deemed vital to the proper operation of a military service system. The admonition of Mr. Justice Holmes that "[t]oo broadly generalized conceptions are a constant source of fallacy" (*Lorenzo* v. *Wirth,* 170 Mass. 596, 600) is fairly applicable to petitioner's argument here.

3. Even assuming *arguendo* that there is surface plausibility to the claim that because of his initial failure to register petitioner's predicament—even though created by his own wrongdoing—entitles him to invoke the privilege,[26] there is, in any event, a sound

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tion, pp. 103, 130–131) is misplaced. The language quoted relates to the *initial* obligation to register, not a refusal to register thereafter on the ground that it involved incrimination as to the earlier refusal.

[26] But see *Schmerber* v. *California*, 384 U.S. 757, 762, where this Court pointedly stated that "the privilege has never been given the full scope which the values it helps to protect suggest." And see *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286.

basis for concluding that the invocation of the privilege did not provide a defense in this case.

Had petitioner registered some time subsequent to his eighteenth birthday, he would not have committed "an act of compulsory self-incrimination" (Pet. Br. 27). On the contrary, belated registration, if anything, would have tended to negate the necessary element of willfulness ~~necessary~~ required to support conviction of the offense with which he was charged. Any extrajudicial statement as to his date of birth, made after petitioner may have finally appeared for registration, would have been insufficient in itself to prove that an earlier failure to register had been willful. See *Smith* v. *United States*, 348 U.S. 147, 155; *Gay* v. *United States*, 408 F. 2d 923, 931–932 (C.A. 8). Cf. *Fowler* v. *United States*, 352 F. 2d 100, 107 (C.A. 8), certiorari denied, 383 U.S. 907.

Indeed, in the usual case it is to a person's advantage to register belatedly, rather than not to register at all. While there is no formalized policy on the matter, it is fair to say that a male who willfully fails to register at age eighteen, but thereafter does register and shows a willingness to perform his military obligation, will not normally be prosecuted for his pre-existing violation. The purpose of the Selective Service System is not to put men in prison but to provide them for the military establishment.[27] Cf. Selective Service Sys-

[27] Of course, a different situation would present itself where the late registration had resulted in a benefit—*e.g.*, avoidance of participation in the Armed Forces during a time of national emergency, or where at the time of registration, the late registrant

tem, *Legal Aspects of Selective Service,* pp. 46–47 (1969 rev.). Thus, had Toussie, in fact registered—albeit at a time subsequent to the time he was required to—and had he then evidenced a desire to comply with his military obligations, the chances of his prosecution for failing to register up to that point would have been remote at best,[28] and the danger of incrimination "imaginary and unsubstantial." *Marchetti* v. *United States, supra,* 390 U.S. 39, 48; see also, *Minor* v. *United States,* No. 189, this Term, decided December 8, 1969.

III

THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL TO CHARGE THE JURY THAT IT HAD TO ACQUIT PETITIONER IF IT FOUND THAT HIS REFUSAL TO REGISTER WAS BASED ON SINCERELY HELD RELIGIOUS BELIEFS.

Petitioner urges (Pet. Br. 33–43) that his constitutional rights were violated because the trial court refused to instruct the jury that it had to acquit petitioner if it believed that his failure to register was the product of a sincere and conscientious belief (see App. 48–51, 136, 292).[29] This contention is insubstantial and warrants only summary discussion.

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had acquired a status upon which a claim of exemption or deferment could be based. Prosecution in such circumstances could properly be viewed as remedial—*i.e.*, prevention of the registrant's profiting from his belated compliance. Cf. *Costello* v. *United States,* 365 U.S. 265; *Chaunt* v. *United States,* 364 U.S. 350.

[28] As a matter of fact, in this very case in response to an inquiry from the trial court government counsel advised that had petitioner registered a year after his eighteenth birthday he would never have been indicted (App. 57–58).

[29] The trial court instructed that petitioner's motive and philosophy were immaterial except as aids in determining his

Congress has constitutional authority "[t]o raise and support Armies" (Art. 1, Sec. 8), and, to effectuate that specific grant of authority, the power to register and thereafter conscript manpower for the national defense. *Selective Draft Law Cases*, 245 U.S. 366; *United States* v. *O'Brien*, 391 U.S. 367. Of course, Congress may not carry out this power in a way which violates the First Amendment. Nor may a court or Congress arbitrarily discriminate between persons or classes in violation of the due process clause of the Fifth Amendment. No such transgression of constitutional rights occurred here.

However unfettered may be the freedom to believe, it does not require that religious scruples be recognized as justifying disobedience to a valid law. *E.g., Cantwell* v. *Connecticut*, 310 U.S. 296, 303–304; *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29; *Reynolds* v. *United States*, 98 U.S. 145. The requirement that all males within specified ages register for the draft is such a valid law.

In *Hamilton* v. *Regents*, 293 U.S. 245, 268, a group of persons sought exemption from compulsory military training at the University of California on religious grounds. Their claim was rejected. Quoting with approval the language in *United States* v. *Macintosh*, 283 U.S. 605, 623–624, this Court observed (293 U.S. at 264):

> The conscientious objector is relieved from the obligation to bear arms in obedience to no

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intent and mental capacity (see App. 286–287, 134–135). (The issue of mental responsibility is no longer in the case.)

> constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. * * * The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. * * * [T]he war powers * * * include * * * the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. * * *

In a concurring opinion, Justice Cardozo, joined by Justices Brandeis and Stone, recognized that an extension of the conscientious objector's liberty might lead to wholly incongruous situations (293 U.S. at 268):

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war * * * or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

See also *In Re Summers,* 325 U.S. 561; *United States* v. *Kauten,* 133 F. 2d 703, 708 (C.A. 2) (Augustus Hand, J.). The requirement of registration *per se* does not even raise a First Amendment question;

much less does it impose an impermissible burden on the right of untrammeled religious belief.

Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies would that provision be available to petitioner. And if that provision is given such a sweeping scope, it would of necessity extend beyond the Selective Service context and reach all matters as to which an individual claimed to have conscientious scruples. See generally Comment, 34 U. Chi. L. Rev. 79, 102 (1966). Such a construction of the First Amendment finds no support in our history or in our jurisprudence. Cf. *Walker* v. *City of Birmingham*, 388 U.S. 307, 320–321. Its natural tendency would be to destroy the orderly functioning of government and to undermine the integrity of the democratic process. In short, even if it be assumed that petitioner was a conscientious objector—a claim that he chose not to submit to any draft board for examination—no impermissible burden was placed upon his freedom of conscience in requiring that he perform the simple act of registration.[30]

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[30] Petitioner's heavy reliance on *Sherbert* v. *Verner*, 374 U.S. 398, is not warranted. *Sherbert* dealt with the power of a State to preclude a Seventh Day Adventist from receiving unemployment benefits where she refused because of her conscientious religious scruples to work on Saturday. As this Court pointed out, this statute directly impeded the free exercise of religion by forcing Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (374 U.S. at 404)—and this

Petitioner further complains (Pet. Br. 43–46) that exemptions from military service for conscientious objectors may be discriminatory in that such relief does not encompass conscientious objectors who feel they cannot bring themselves to register. But Congress has not only provided an exemption for conscientious objectors, but it has also provided a readily available, non-burdensome method for the determination of such claims.[31] See *United States* v. *Nugent*, 346 U.S. 1. Few would contend that it is an invidious discrimination (see, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497, 499) to require that unless one first comply with the registration requirement he is in no position to contend that he is entitled to conscientious objector status.

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without a showing that the conduct regulated "invariably posed some substantial threat to public safety, peace or order" (374 U.S. at 403, 406–408). It is thus distinguishable from the case here where the national interest in having all males register for the draft is of paramount importance and where the act of registration places at most a minimal burden on conscientious objection to war.

[31] The statutory provision regarding conscientious exemption is now Section 6 (j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456 (j)). The regulations set forth the specific procedures under which registrants may seek conscientious objector status. See, *e.g.*, 32 C.F.R. 1621.11, 1622.11, 1622.14, 1660.1, 1660.10, 1660.20, 1660.21, 1660.30, 1660.31.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General.
JEROME M. FEIT,
EDWARD FENIG,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 441

ROBERT I. TOUSSIE,

Petitioner,

against

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

MURRAY I. GURFEIN,
Attorney for Petitioner,
655 Madison Avenue,
New York, N. Y.

JACOB W. HELLER,
Of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
I. (Replying to Government's Brief Point I, pp. 10-21)	1
II. (Replying to Government's Reply Point II, pp. 21-29)	8
III. (Replying to Government's Reply Point III, pp. 29-33)	11
Conclusion	11

INDEX TO CASES

Bridges v. U. S., 346 U. S. 209	2
Chandler v. U. S., 171 F. 2d 921 (1st Cir.)	6
Fogel v. U. S., 162 F. 2d 54 (1947)	3
Gara v. U. S., 178 F. 2d 38 (6th Cir. 1959)	7
Ginn v. U. S., 222 F. 2d 289 (1955)	7, 11
Girouard v. U. S., 328 U. S. 61 (1946)	11
Grunewald v. U. S., 353 U. S. 391 (1957)	2
Hanf v. U. S., 235 F. 2d 710 (8th Cir.)	6
Hoffman v. U. S., 341 U. S. 487	9
Kaohelauli v. U. S., 389 F. 2d 495 (9th Cir. 1968)	11
Korholz v. U. S., 269 F. 2d 897 (10th Cir.)	6
Krulewitch v. U. S., 336 U. S. 440 (1949)	2
McGregor v. U. S., 206 F. 2d 583 (4th Cir. 1953)	7
Panama Refining Co. v. Ryan, 293 U. S. 388 (1935)	6

PAGE

Pendergast v. U. S., 317 U. S. 412 (1943) 2
U. S. v. Cares, 356 U. S. 405 (1958) 1
U. S. v. Franklin, 188 F. 2d 182 (2nd Cir.) 6,7
U. S. v. Habig, 390 U. S. 222 (1968) 2
U. S. v. Irving, 98 U. S. 450 (1878) 2,3,5
U. S. v. Manton, 107 F. 2d 834 (2nd Cir.) 6
U. S. v. McElvain, 272 U. S. 623 (1926) 2
U. S. v. Midstate Co., 306 U. S. 161 6
U. S. v. Price, 361 U. S. 304 (1959) 4
U. S. v. Scharton, 285 U. S. 518 (1932) 2
U. S. v. Socony Vacuum Oil Co., 310 U. S. 150 6

STATUTES AND REGULATIONS

26 U.S.C. § 6531 10
26 U.S.C. § 6573 10
50 U.S.C. App. § 453 2,4
50 U.S.C. App. § 454 4
81 Stat. 100 4
Presidential Proclamation No. 2799 7

AUTHORITIES ..

U. S. Code Congressional Administrative News (90th Cong. 1st Sess. 1967) 5

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REPLY BRIEF ON BEHALF OF PETITIONER

We respectfully ask the Court's indulgence briefly to reply to the Government's brief.

I.

(Replying to Government's Brief Point I, pp. 10-21.)

The Government asserts that whether an offense is a continuing one is a matter of statutory interpretation. But with respect to the statute of limitations it cites no case in this Court that is favorable precedential support for its assertion.

It cites only two cases to the contention. *U. S.* v. *Cores*, 356 U. S. 405 (1958), involves not a statute of limitations but a question of venue. The majority there relied

on the particular language of the statute relating to an alien seaman who "remains in the United States." The majority wrote: "The crucial word 'remains' permits no connotation other than continuing presence" (356 U. S. at p. 408). *Pendergast* v. *U. S.*, 317 U. S. 412, cited in our main brief, pp. 13, 15, is in our favor, for there the Court refused to extend the crime to make it a "continuous offense."

The Government seeks to assimilate the continuous process in the Selective Service System involving registrants to the problem of the non-registrant. When one registers for the draft his status becomes that of a registrant. This naturally involves a continuing status so that processing may continue. The analogy of continuing duties under the continuing status of the registrant (Govt. Br. p. 12) is inapplicable to the man who wilfully failed to register. He chose to be liable for criminal sanctions and the issue is simply when his wilful breach of his obligation to register occurred so as *immediately* to subject him to the criminal sanction.

The Government with commendable candor, admits that "of course the statute might be more explicit * * *" (Govt. Br. p. 15). The reference is to 50 U.S.C. App. § 453. But it fails to comment at all on the long standing liberal rules of construction with respect to statutes of repose in this Court (*U. S.* v. *Irvine*, 98 U. S. 450 [1878]; *U. S.* v. *McElvain*, 272 U. S. 623, 639 [1926]; *U. S.* v. *Scharton*, 285 U. S. 518 [1932]; *Bridges* v. *U. S.*, 346 U. S. 209, 215-216 [1953]; *U. S.* v. *Habig*, 390 U. S. 222, 227 [1968]; *Pendergast* v. *U. S.*, *supra;* and see discussion in our main brief, pp. 13-16).

It can hardly matter whether the attempt to enlarge the statute of limitations is by judicial interpretation or by the suggestion of "subsidiary conspiracies" (*Grunewald* v. *U. S.*, 353 U. S. 391 [1957]; *Krulewitch* v. *U. S.*, 336

U. S. 440 [1949]); or as the Court of Appeals in its opinion below conceded, by "the continuous offense doctrine" which "for all practical purposes extends the statute beyond its stated term" (A. 302).

There is something inherently unpalatable to the judicial process in the filling in of statutory gaps in criminal cases—particularly with respect to an unbroken historical tradition of liberal interpretation of statutes of repose. It is this sense of fairness of lawyers and judges that probably impelled the knowledgeable draftsmen for the American Law Institute to react so strongly to the inconsistency between the continuous offense doctrine and the purpose of time limitations (Main Br. p. 15). The example given of "too free" application of the continuous offense doctrine is significantly the judicial interpretation by the Fifth Circuit of the earlier Selective Service Act (*Fogel* v. *U. S.*, 162 F. 2d 54 [1947]). We say the criticism is significant because the Government relies so heavily on the argument that the continuous offense doctrine is essential to the Selective Service System and is "inherently" implied in the statute. If these comments were as valid and self-evident as the Government believes, we wonder why a group of objective and learned men should have singled out this particular interpretation of a Selective Service regulation rather than something else for an example of the undesirable in interpretation.*

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* Judge Sibley dissenting in the *Fogel* case, *supra*, reasoned that even if there was a continuing duty to register that did not extend the statute of limitations since the crime was complete on the day the defendant failed to register, for "nothing at all happens after the crime becomes complete" (162 F. 2d at 64). He noted that in *U. S.* v. *Irvine*, 98 U. S. 450, the duty to pay over the money was certainly a "continuing duty" but the Court held the statute of limitations applied, and began to run so soon as it was evident that the withholding was wrongful" (*Ibid.*). We respectfully suggest that Judge Sibley's view is more consonant with the historic treatment of statutes of limitation in this Court than are the views of the Courts of Appeal.

The answer is that the statutory section requiring registration contains not the slightest language supporting the continuous offense theory. The Second Circuit in its opinion below, with scrupulous intellectual honesty, refused to imply into the *statute* what was not there. Its language is not the language of a Court that has accepted the Government's present arguments.

The Court below clearly based its ruling on the regulation itself. We note that the Government has cited no instance where Congress has delegated a question of criminal time-limitation to the executive branch.

The Government appears to disagree with the Court of Appeals in urging that "it is the Selective Service statute itself which makes registration a continuing duty". We submit that the rationale of the decision below was otherwise. We do not beg the question, moreover, when we urge that "law" in the general statute of limitations does not mean a regulation (Govt. Br. p. 14). The determination of that issue is essential to the result. And for the reasons given in our main brief, we respectfully suggest that the Court of Appeals was in error on this point.

The Government contends that §§ 453 and 454 are interrelated provisions and must fairly be read in *pari materia* (Govt. Br. p. 13). The Government, we think, is wrong historically. The provision in § 454 "that notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall immediately be inducted" did not become law until June 30, 1967 by specific amendment (81 Stat. 100). § 453 on the other hand dates back to the original statute. To be read in *pari materia* the two sections must be contemporaneous enactments or at least there must be a finding that there was not a specific purpose for one section, inapplicable to the other (*U. S.* v. *Price,* 361 U. S. 304, 313 [1959]). The specific purpose of the amendment is, however, actually set forth in the legislative history of the Military

Selective Service Act, U. S. Code Congressional Administrative News (90th Cong. 1st Sess. 1967) p. 1346. The purpose of the amendment was a limited one, namely, to insure "that a registrant who prolongs such litigation of his draft classification beyond the age of 26 would nonetheless be liable for induction if he is later found qualified for induction" (See Conference Report No. 346, *id.* at p. 1353).

The amendment of 1967 had nothing to do with the doctrine of continuous offenses so far as the statute of limitations is concerned. It addressed itself to a limited problem, that is of the registrant who by litigation had extended the time for his induction beyond age of 26. It merely clarified this very special situation to provide that in such case the duty to report did not cease. To the extent, however, that it does represent a continuous duty provision of a sort, it makes clear that Congress, as we suggested, knew how to state its purpose to create a continuing duty in clear language. No such language appears in § 453.

The argument is made that Congress amended and reenacted the Selective Service statutes without suggesting that it deemed the regulation at odds with the statutory purpose. That is a fair argument. But no evidence has been adduced to show that Congress actually considered that the effect of the regulation was to extend the statute of limitations. On its face the regulation says nothing about the statute of limitations and it is hard to believe that Congress, jealous of its legislative prerogative and historic role with respect to statutes of limitation, would not have legislated about the matter itself, if it had intended to affect the general statute of limitations. Nor is there evidence that Congress gave any thought to amending the general statute of limitations itself as it affected registration for selective service. A continuing duty does not necessarily make a continuous offense with respect to the statute of limitations. (*U. S.* v. *Irvine*, 98 U. S. 450 [1878]).

As to the argument of unconstitutional delegation of legislative power, acquiescence by Congress is not the test. It is the function of this Court to declare the boundaries between the legislative and executive branches of Government (*Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421 [1935]).

The Government's argument concerning "accepted legal principles regarding continuous offenses" is weak (Govt. Br. p. 16). For a person, like Toussie, who was not yet eighteen years old when the Act took effect, there was no duty to register until he attained his eighteenth birthday. When that occurred he was obligated to register. He had a five-day period within which to register. When he failed to do so, his omission was complete. Nothing happened after that. The cases involving a continuation of a series of affirmative acts are, therefore, not in point.

Thus, the quotation from *U. S.* v. *Midstate* (Govt. Br. p. 16), does not relate to the problem of offenses "continuous" in *time,* but to the act of transportation and whether venue attaches in districts through which the goods passed —a conception unrelated to our problem.

The broad claim that "any course of conduct designed or required to accomplish the final criminal objective by stages or waiting, may result in a continuous offense" (Govt. Br. p. 16) is not supported by the cases cited. *Socony* merely involved the scope of a conspiracy to determine whether a particular overt act was sufficient for venue. *Chandler* was a treason case where the statute itself made the crime a course of conduct. *Manton, Hanf* and *Korholz* did not involve the statute of limitations problem, but merely whether the indictments were duplicitous for stating a single offense when several might have been stated. That is not the issue here. *U. S.* v. *Franklin,* is in point, at least in the sense that it deals with a registration statute. But the decision was *ex cathedra* with no

explanation for the result except for the opinion that it was essential to national security to control aliens in wartime (188 F. 2d at 187). The Third Circuit judges in *Ginn* v. *U. S.*, 222 F. 2d 289 (1955), seemed to cast some doubt on whether they agreed with the holding. In any event, alien registration statutes are distinguishable because of the Government's general control over aliens admitted within our borders.

Even if *U. S.* v. *Franklin* was rightly decided within the context of the policy of the Alien Registration statute, it is hardly precedent for holding that young men who failed to register for the draft when they were eighteen can be prosecuted thirteen years later or for a lifetime—certainly without a clear expression of Congressional intent to achieve that harsh result.

The Government scoffs at the idea that the regulation that duty to submit to registration "shall continue at all times" could be construed to mean that a man of seventy could be prosecuted for failure to register at eighteen (Govt. Br. p. 20). The fact is that two Courts of Appeal have extended the statute beyond age twenty-six (*McGregor* v. *U. S.*, 206 F. 2d 583 [4th Cir. 1953]; *Gara* v. *U.S.*, 178 F. 2d 38 [6th Cir. 1959]).

On the continuing offense theory either the statute is without end or, as the Government now and the Court below suggest, the duty ends at age twenty-six. But this leads to an anomalous result. In practical effect it creates different periods of limitation for persons of different ages. In the initial age group required to register there were young men ranging in age from eighteen to twenty-six. (See Presidential Proclamation No. 2799, App. to Main Brief, at pp. A-6 to A-7.) If a man aged twenty-five wilfully failed to register, under the theory of the Court of Appeals, the statute of limitations ran five years after he attained the age of twenty-six—or *six* years after the

initial registration. If a man aged nineteen wilfully failed to register the statute ran five years after he attained the age of twenty-six—or *twelve* years later.

It is difficult to say that Congress intended such a result without legislative deliberation and debate. Yet, whether the regulation is interpreted as without end or as limited to age twenty-six, with attendant discriminatory consequences, the matter is certainly one of legislative policy. Either version of the continuous offense theory based on a regulation and not on a statute, is unconstitutional.

II.

(Replying to Government's Brief Point II, pp. 21-29.)

We shall not repeat our arguments with respect to self-incrimination under the Fifth Amendment. They are set forth in our main brief, pages 24-33.

Here we comment on certain arguments in the Government's brief (Govt. Br., pp. 21-29):

We do not contend that the requirement of *initial* registration for Selective Service was unconstitutional for self-incrimination reasons. Nor do we contend that if a continuing duty is *not* imposed, such a constitutional problem would arise. We do contend that if there is a continuing duty to register after the stated time for registration (18th birthday) has elapsed, it is the same, in practical effect, as if there were two statutes. The continuing duty statute requires the delinquent registrant to expose himself to prosecution for his *existing* delinquency. The fact that he has not actually registered is irrelevant in the context of the *Albertson* and *Leary* doctrines.

Regardless of the distinction the Government seeks to make between an initial registration and the case at bar, the circumstance remains that without the continuing duty

Toussie would be free, for his initial failure to register is concededly outlawed by the five-year statute of limitations. If Toussie had been indicted within five years of his eighteenth birthday for failure to register *on* his eighteenth birthday (and not for a continuous offense), the Fifth Amendment question would not have arisen. It is only if he is subject to a duty to register after the eighteenth birthday period that his conviction can be sustained as to the statute of limitations. But that makes it evident that he was prosecuted for something different from his simple failure to register when he became eighteen years of age. He was prosecuted for failure to register at some time within five years of his indictment, only because he was still under a duty to register then. This puts him in the same status as any other criminal suspect upon whom registration would impose substantial hazards of self-incrimination because of *earlier* criminal activities.

The Government has asserted in support of its continuous offense theory that "his [Toussie's] objective was not served simply by his failure to register at age eighteen; it required his continued failure to register at any time thereafter until he reached age twenty-six" (Govt. Br. p. 18).

If Toussie was continuously engaged in crime by continuously avoiding registration—as the Government claims with respect to the statute of limitations—he is in the same position as those whose "chief occupation" "involves evasion of federal criminal laws"—and "truthful answers by petitioner to these questions might have disclosed that he was engaged in such proscribed activity" (*Hoffman* v. *U. S.*, 341 U. S. 487-488 [1951]).

The constitutional rule required for the suspected racketeer is at least as applicable to the draft resistor. And, although in *Hoffman* the question was of testimonial compulsion on interrogation, the impact of a compulsion

to register, divulging name and age, is the same in this setting. The suggestion that Toussie's involvement "because of his own dereliction" puts him beyond the pale of the Fifth Amendment protection misses the whole thrust of the cases from *Albertson* down. Each defendant in the series of cases was in jeopardy because of his own derelictions. From Communist party member to narcotics or gambling purveyor they were in no different status constitutionally than Toussie.

The Government's examples of the far-reaching effect of our contention are inapposite. For example, the Government's contention that under our constitutional argument "a registrant could wilfully burn his draft card and by invoking the privilege a person could fully immunize himself from the requirement that he carry a draft card" (Govt. Br. p. 27) is an attemped *reductio ad absurdum*, but it misconceives our argument. If a registrant wilfully burns his draft card, he may be prosecuted for its destruction, but conceivably the registrant can obtain another draft card without revealing that he burned the previous card. The delinquent registrant cannot register, however, without giving his date of birth and revealing his earlier failure to register. Moreover, in the draft card burning case, the draft boards, despite present practice, may not constitutionally compel the registrant to admit that he burned his draft card.

The Government's income tax analogy is inapt (Govt. Br. p. 26). If Congress had made failure to file in a given tax year a continuous offense the problem would arise as to whether a late filing would not be protected by the privilege—as in the case at bar. Since Congress did not so provide for the particular tax year the statute of limitations runs from the date when the filing was due (26 U.S.C. §§ 6531, 6573). That any future act may incidentally reveal upon investigation the earlier failure to file is not within the privilege because what is involved is a gen-

eral duty applicable to all and not merely to a select group. In the case at bar compulsory late registration applies *only* to those who are delinquent. It may be interesting to note that the Court of Appeals for the Third Circuit recognized the Fifth Amendment problem in the context of alien registration as early as 1955, although it found it unnecessary to decide the constitutional point (*U. S.* v. *Ginn*, 222 F. 2d 289, 291 [1955]).

Lastly, the Government, in undoubted good faith, believes that a delinquent registrant would not be prosecuted in any event. But the Government frankly concedes that "there is no formalized policy on the matter" (Govt. Br. p. 28). And we know that one Kaohelauli was actually convicted as an immediate and proximate result of his tardy registration (*Kaohelauli* v. *U. S.*, 389 F. 2d 495 [9th Cir. 1968]; Main Br. p. 31). One needs no more striking illustration of the actual peril of late registration.

III.

(Replying to Government's Brief Point III, pp. 29-33.)

The Government, significantly, has argued the First Amendment point of our brief without any reference to *Girouard* v. *U. S.*, 328 U. S. 61 (1946).

The Government claims, moreover, that a view of the Free Exercise Clause favorable to our position "would of necessity extend beyond the Selective Service context and reach all matters as to which an individual claimed to have conscientious scruples" (Govt. Br. p. 32). That is, of course, an arguable position, as any consideration of the reach of a particular constitutional provision must be. But we suggest it is neither a sound nor a compelling position. Conscientious objection to killing has always been recognized as a special ground for exemption where general civil disobedience has not. The issue here is narrower

than the Government makes it out to be. Can the process of conscription be conscientiously deemed to be so much a part of war as to merit judicial recognition for a conscientious objector to the process? This is not the same problem as a refusal to pay taxes which are levied for the general welfare and not specifically for war. To be sure, there must be a point at which the free exercise clause must bow to the needs of the state. But where is that line?

If we limit our inquiry to the draft laws and conscientious objection to the process of conscription, we are neither embracing civil disobedience, nor suggesting more than that the balance favors freedom of religious conscience where so few objectors are involved as compared with the manpower need.

We do not repeat the arguments in our main brief (pp. 33-45). Suffice it to note that the Government has not disputed our statistics as to the relatively small number of religious conscientious objectors (Main Br. p. 39). Nor has it met the point that sincerity of belief would still have to be passed upon by a skeptical jury who would be unlikely to acquit unless the sincerity of the conscientious objection was beyond doubt. The difficulty we suggest is that a true conscientious objector to registration is deprived of any forum to test the sincerity of his beliefs if the administrative procedures of the Act are held to be exclusive. There is a heavy burden on the Government to show that the Selective Service System could not function if the few principled dissenters involved were permitted to let a jury pass on their sincerity in a criminal case. Despite broad generalizations, we respectfully suggest that the Government's position is not persuasive in terms of that burden.

CONCLUSION

For all the reasons hereinabove stated in our main brief and in this reply brief, it is respectfully prayed that the judgment below be reversed and the indictment dismissed; or, in the alternative, that the judgment be reversed and the cause remanded for a new trial.

Dated: New York, New York, January 9, 1970.

Respectfully submitted,

MURRAY I. GURFEIN,
Attorney for Petitioner,
655 Madison Avenue,
New York, N. Y. 10021.

JACOB W. HELLER,
Of Counsel.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 441.—October Term, 1969

Robert I. Toussie, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 2, 1970]

Mr. Justice Black delivered the opinion of the Court.

Petitioner Robert Toussie was convicted, after a jury trial, of failing to register for the draft. His conviction was affirmed by the Court of Appeals, 410 F. 2d 1156 (C. A. 2d Cir.), and we granted certiorari, 396 U. S. 875 (1969). For the reasons hereafter set forth we conclude that this prosecution was barred by the statute of limitations and therefore reverse the conviction.

Section 3 of the Universal Military Training and Service Act, 65 Stat. 75, provides that:

> "Except as otherwise provided in this title, it shall be the duty of every male citizen . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder." [1]

[1] 50 U. S. C. App. § 453. This Act was amended by the Military Selective Service Act of 1967, 81 Stat. 100, but those amendments did not change this provision. Failure to perform this duty is punishable by fine, imprisonment, or both. 50 U. S. C. App. § 462 (a).

The applicable presidential proclamation provides that "[p]ersons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter."[2] Since Toussie, an American citizen, was born on June 23, 1941, he was required to register sometime between June 23 and June 28, 1959. He did not do so during that period or at any time thereafter. On May 3, 1967, he was indicted for failing to register and that indictment led to the conviction under review.

Before trial Toussie moved to dismiss the indictment, arguing that prosecution was barred by the statute of limitations which provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U. S. C. § 3282. Since there is no express provision to the contrary in the Draft Act, Toussie argued that his crime was complete in 1959, and it could not be the subject of a prosecution based on an indictment returned in 1967—eight years thereafter. The Government agreed that the crime was complete in 1959, but argued that it continued to be committed each day that Toussie did not register. The District Court held that the Act imposes a continuing duty to register which lasts until age 26 and that prosecution for failing to perform that duty before the man becomes 26 is timely if the indictment is returned before the defendant becomes 31 years old—in this case anytime prior to June 23, 1972. 280 F. Supp. 473, 474 (D. C. E. D. N. Y. 1967). The Court of

[2] Proclamation No. 2799, July 20, 1948, 62 Stat. 1531. The Proclamation was first issued under the authority of the Selective Service Act of 1948, 62 Stat. 604, but it was continued after the passage of the Universal Military Training and Service Act by Proclamation No. 2942, August 30, 1951, 65 Stat. c35.

Appeals agreed. 410 F. 2d, at 1157–1158. If the offense is a continuing one the prosecution was timely, but, if not, the District Court erred in not dismissing the indictment.

In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitation statutes are 'to be liberally interpreted in favor of repose,' *United States* v. *Scharton*, 285 U. S. 518, 522 (1932)." *United States* v. *Habig*, 390 U. S. 222, 227 (1968). We have also said that "[s]tatutes of limitations normally begin to run when the crime is complete." *Pendergast* v. *United States*, 317 U. S. 412, 418 (1943); see *United States* v. *Irvine*, 98 U. S. 450, 452 (1878). And Congress has declared a policy that the statute of limitations should not be extended "except as otherwise expressly provided by law." 18 U. S. C. § 3282. These principles indicate that the doctrine of continuing offenses should only be applied in limited circumstances since, as the Court of Appeals correctly observed in this case, "[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term." 410 F. 2d, at 1158. These

considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

The statute in this case provides that all young men, with certain exceptions, between the ages of 18 and 26 shall register "at such time or times and such place or places" as the President may prescribe. The Government refers to a regulation promulgated under the Act which provides that "[t]he duty of every person subject to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration . . . ." 32 CFR § 1611.7 (c). It is urged that this regulation only makes explicit what Congress implicitly said in the Act itself, that is that registration is a duty that continues until age 26 and failure to register before then is a criminal offense that can be punished as late as five years after the 26th birthday.

The statute admittedly might be construed as the Government urges, but in light of the history of the draft laws and the principle that continuing offenses are not to be too readily found, we do not feel this particular act incorporates such a doctrine. The draft law of 1917 provided that certain persons were subject to registration and that "upon proclamation by the President . . . stating the time and place of such registration it shall be the duty of all [such] persons . . . to present themselves for and submit to registration." 40 Stat. 76, 80. Pursuant to that authority the President pro-

claimed June 5, 1917, as the first registration day,[3] and on that day approximately 10,000,000 young men were registered.[4] There were no more general draft registrations until August 24, 1918, when the President required all those men who had become subject to registration since June 5, 1917, to come in and register.[5] Later that year Congress amended the statute, expanded the age group subject to registration,[6] and provided that "upon proclamation by the President . . . stating the time or times and place or places of . . . registration, it shall be the duty of all persons of the designated ages . . . to present themselves for and submit to registration . . . ." 40 Stat. 955–956. Although this provision seemingly would have authorized registrations on different days, the President again issued a proclamation designating a single day, September 12, 1918, as registration day for all those so subject.[7] That registration was the last under the World War I draft. It is thus clear that throughout the administration of the first draft law, registration was thought of as a single, instantaneous act to be performed at a given time, and failure to register at that time was a completed criminal offense.

As events developed prior to what became World War II, Congress again decided to draft young men for service in the Armed Forces. In the Selective Service and Training Act of 1940 it was provided that men subject to registration were to register "at such time or times and place or places, and in such manner and in

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[3] Proclamation of May 18, 1917, 40 Stat. 1664.

[4] U. S. Selective Service System, Registration and Selective Service, 11 (1946).

[5] Proclamation of August 13, 1918, 40 Stat. 1834.

[6] The first registration was of all men between the ages of 21 and 30. 40 Stat. 80. In 1918 Congress expanded the group to all those between the ages of 18 and 45. 40 Stat. 955.

[7] Proclamation of August 31, 1918, 40 Stat. 1840.

such age group or groups, as shall be determined by rules and regulations prescribed hereunder." 54 Stat. 885. While this language would again have authorized registration on different days for different men, the first proclamation under the new Act set a uniform date, October 16, 1940, for the registration of all men.[8] It was not until two years later that the President first issued a proclamation setting forth different dates for the registration of different groups of men, and in that same proclamation the President established the basic registration procedure of the present system, that all young men shall register on their 18th birthday.[9]

After the 1940 Act expired on March 31, 1947, Congress again decided to register men for the draft and declared that men between the ages of 18 and 26 would be subject to registration. Selective Service Act of 1948, 62 Stat. 604. Since the authority to register under the 1940 Act had expired, it was necessary to provide for the initial registration of the entire group of men between 18 and 26. In language identical to that found in the statute involved in this case,[10] Congress again left the administrative details to the President and authorized registration "at such time or times and place or places" as he might designate. We do not think the imposition of the duty to register on men between 18 and 26 and the provision for registration at different times was intended to indicate that the statute of limitations did not begin to run when the crime was first complete. Since at the time of the initial registration under the 1948 Act there were men of various ages who had to be registered, the Act was phrased generally in terms of a duty imposed on the entire group. Under this authority the President in fact re-

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[8] Proclamation No. 2425, September 14, 1940, 54 Stat. 2739.
[9] Proclamation No. 2572, November 17, 1942, 56 Stat. 1982.
[10] See p. 1, *supra*.

quired registration of all men between 18 and 26 during the month of September 1948. Persons of different ages were required to register on different days, and all those born after September 19, 1930, were required to register "on the day they attain the eighteenth anniversary of their birth, or within five days thereafter." [11] The registration provisions of that Act have remained in force since 1948, and there has thus been a continual registration of 18-year-olds shortly after their birthday. With the exception of a few men who are not subject to registration when they are 18 but may become so subject later on,[12] the effect of these provisions has been to eliminate the necessity for registrations of men older than 18. Viewed in the light of history we do not think the Act intended to treat continued failure to register as a renewal of the original crime or the repeated commission of new offenses, but rather perpetuated the conception of the first registration that a man must register at a particular time and his failure to do so at that time is a single offense. That time will not be the same day for all as it was in 1917, and from the Selective Service System's viewpoint the process of registration is a "continuing" one. But from the registrant's viewpoint the obligation arises at a specific time. In Toussie's case it arose when he turned 18. He was allowed a five-day period in which to fulfill the duty, but when he did not do so he then and there committed the crime of failing to register.

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[11] See p. 2, *supra*, and Proclamation No. 2799, July 20, 1948, 62 Stat. 1531.

[12] For example, students at certain military colleges are exempted from registration. 50 U. S. C. App. § 456 (a) (1). If such a student withdraws from that study, he would presumably be required to register since the Act specifically states that "[n]o exemption from registration . . . shall continue after the cause therefor ceases to exist." 50 U. S. C. App. § 456 (k). Thus such a student may not be required to register until some time after his 18th birthday.

The Government points out that the "continuing duty" regulation has been in existence since before the passage of the 1948 Act,[13] and that most lower federal courts have held that failing to register is a continuing offense for purposes of applying the statute of limitations.[14] It is suggested that since Congress has legislated several times in this field, its failure to indicate that the crime should not be treated as a continuing offense supports the Government's argument that it is. Petitioner on the other hand suggests that Congress has on occasion explicitly stated that a certain offense will be deemed a continuing one,[15] and its failure to do so in this statute indicates that it did not intend to adopt that theory. Since there is no specific evidence that Congress actually was aware of this limitations question when it acted—whatever weight such evidence might deserve—and since we are reluctant to imply a continuing offense except in limited circumstances, we conclude that any argument based on congressional silence is stronger in favor of not construing this Act as incorporating a continuing offense theory.

Unlike other instances in which this Court has held that a particular statute describes a continuing offense,

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[13] The regulation was first promulgated under the 1940 Act on June 5, 1941. Selective Service System Regulation Vol. 2, § IX, 205 (d), 6 Fed. Reg. 2747.

[14] See *Fogel* v. *United States*, 162 F. 2d 54 (C. A. 5th Cir.), cert. denied, 332 U. S. 791 (1947); *Gara* v. *United States*, 178 F. 2d 38, 40 (C. A. 6th Cir. 1949), aff'd by an equally divided Court, 340 U. S. 857 (1950); *McGregor* v. *United States*, 206 F. 2d 583 (C. A. 4th Cir. 1953); cf. *United States* v. *Guertler*, 147 F. 2d 796 (C. A. 2d Cir. 1945). But cf. *United States* v. *Salberg*, 287 Fed. 208 (D. C. N. D. Ohio 1923).

[15] Congress has provided that concealment of a bankrupt's assets shall "be deemed to be a continuing offense . . . and the period of limitations shall not begin to run until . . . final discharge or denial of discharge." 18 U. S. C. § 3284.

there is no language in this Act that clearly contemplates a prolonged course of conduct.[16] While it is true that the regulation does in explicit terms refer to registration as a continuing duty, we cannot give it the effect of making this criminal offense a continuing one. Since such offenses are not to be implied except in limited circumstances, and since questions of limitations are fundamentally matters of legislative not administrative decision, we think this regulation should not be relied upon effectively to stretch a five-year statute of limitations into a 13-year one, unless the statute itself, apart from the regulation, justifies that conclusion.[17]

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[16] Cf. *United States* v. *Cores*, 356 U. S. 405 (1958), in which the Court held, for venue purposes, that the statute prohibiting alien crewmen from remaining in the United States after their permits expired contemplated that the offense would continue as long as the crewman remained in this country and the statute of limitations did not start to run when he first overstayed his permit. In that case we stated that "[s]ection 252 (c) punishes '[a]ny alien crewman who willfully remains in the United States in excess of the number of days allowed.' The conduct proscribed is the affirmative act of willfully remaining, and the crucial word 'remains' permits no connotation other than continuing presence." *Id.*, at 408. See also *Armour Packing Co.* v. *United States*, 209 U. S. 56 (1908), in which we held that, for venue purposes, violations of the Elkins Act, 32 Stat. 847, were continuing offenses. In that case the statute specifically provided that "[e]very violation . . . shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted . . . ." *Armour Packing*, at 73. Both of these cases dealt with venue and did not involve the statute of limitations question presented in this case.

[17] It is significant that the courts which have concluded that failure to register is a continuing offense have done so by relying explicitly on the regulation. See *Fogel* v. *United States*, *supra*, at 55; *McGregor* v. *United States*, *supra*, at 584; *Gara* v. *United States*, *supra*, at 39; and the opinions below in this case, 280 F. Supp., at 474, 410 F. 2d, at 1157. It is equally significant that the only court which concluded that the offense was not a continuing

There is also nothing inherent in the act of registration itself which makes failure to do so a continuing crime. Failing to register is not like a conspiracy which the Court has held continues as long as the conspirators engage in overt acts in furtherance of their plot. See *United States* v. *Kissel*, 218 U. S. 601 (1910), *Gruenwald* v. *United States*, 353 U. S. 391 (1957). It is in the nature of a conspiracy that each day's acts bring a renewed threat of the substantive evil Congress sought to prevent. The fact that the first draft registrations clearly were viewed as instantaneous events and not a continuing process indicates that there is nothing inherent in the nature of failing to register that makes it a continuing offense.

We do not mean that the argument in support of implying a continuing offense in this case is insubstantial, but it is at best highly equivocal. Basically we are faced with the task of construing a somewhat ambiguous statute in one of two ways. One way would limit institution of prosecution to a period of five years following the initial violation, while the other could effectively extend the final date for prosecution until

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one did so at a time when there was no "continuing duty" regulation issued to implement the registration provisions. *United States* v. *Salberg*, *supra*, interpreting the 1917 Draft Act, held that failure to register was not a continuing offense. The first continuing duty regulation was promulgated in 1941. See n. 13, *supra*. These decisions support our conclusion that the statute itself, apart from any reliance on the administrative regulation, does not require that it be construed to incorporate a continuing offense theory. We do not hold, as the dissent seems to imply, p. 4, *post*, that the continuing duty regulation is unauthorized by the Act. All we hold is that neither the regulation or the Act itself requires that failure to register be treated as the type of offense which effectively extends the statute of limitations.

as much as 13 years after the crime is first complete. As we have said before:

> "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal Corp.*, 344 U. S. 218, 221–222 (1952).

Not insignificantly those remarks were also made in the context of considering the continuing offense doctrine. In light of all these considerations we conclude that the draft law does not intend to permit criminal prosecution for failing to register as late as 13 years after the initial failure. Consequently the statute of limitations begins to run at the initial failure to register as required by law. Since the facts in this case clearly show that Toussie failed in his legal obligation when he did not register prior to June 28, 1959, the statute began to run at that time and prosecution based on an indictment returned almost eight years later was barred.

It should be emphasized that this conclusion does not mean that the gravity of this offense is in any way diminished. Failure to register is subject to heavy criminal penalties. The only question is whether those penalties must result from a prosecution begun within five years or whether they can be delayed for a longer period. We are not convinced that limiting prosecution to a period of five years following the initial failure to register will significantly impair either the essential function of raising an army or the prosecution of those who fail to register. We do feel that the threat of criminal punishment and the five-year statute of limitations is a sufficient

incentive to encourage compliance with the registration requirements. If Congress had felt otherwise it could easily have provided for a longer period of limitations. It has not yet done so.

There is no doubt that the jury found that Toussie willfully failed to register and thereby subject himself to the same possibility of military service that faces other young men who fully comply with their legal obligations. There is some cause to feel that dismissal of the indictment in such a case is an injustice in a society based on full and equal application of the laws. But while Congress has said that failure to register is a crime, it has also made prosecution subject to the statute of limitations. "Every statute of limitations, of course, may permit a rogue to escape," *Pendergast* v. *United States*, 317 U. S. 412, 418 (1943), but when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried, or punished." The judgment of conviction in this case must therefore be

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 441.—October Term, 1969

Robert I. Toussie, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 2, 1970]

Mr. Justice White, with whom The Chief Justice and Mr. Justice Harlan join, dissenting.

The general statute of limitations provides in pertinent part that "except as otherwise expressly provided by law, no person shall be prosecuted . . . unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U. S. C. § 3282. The majority holds that this statute bars petitioner's prosecution, shortly before his 26th birthday, for failing ever to have registered for the draft. That conclusion, I submit, is supported by neither the language, the purpose, nor the history of the applicable Selective Service Acts.

It is at once clear that nothing is gained by stressing that the general statute of limitations applies "except as otherwise expressly provided by law." The question in this case is not whether the five-year statute applies, but when it begins to run. That question in turn depends on what the "offense" is for which petitioner is being tried, and when it was that he committed that offense. In the typical case, an offense is complete as soon as every element in the crime occurs, and the statute of limitations begins to run from that date. But in the case of a "continuing offense," the crime is not exhausted for purposes of the statute of limitations as long as the proscribed course of conduct continues. *United States* v. *Cores*, 356 U. S. 405, 409 (1958); *United States* v.

Kissel, 218 U. S. 601, 607 (1910); see Model Penal Code § 1.07, Comment (Tent. Draft No. 5, 1956). The question into which category a given offense falls has long been held to be entirely a matter of statutory interpretation. See, *e. g.*, *United States* v. *Cores*, 356 U. S. 405 (1958); *Pendergast* v. *United States*, 317 U. S. 412, 419–421 (1943); *Bramblett* v. *United States*, 231 F. 2d 489, 491 (C. A. D. C. Cir.), cert. denied, 350 U. S. 1015 (1956).

In this case, the offense derives from 50 U. S. C. App. §§ 453 and 462 (a). The latter section makes it a crime to evade registration or to "neglect or refuse to perform any duty" required by the Selective Service laws. The former section—453—spells out the "duty" which petitioner is charged with failing to perform here:

> "[I]t shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

By any natural reading of this language, at least where the President has established "times" and "places" for continually accepting registrations, the "offense" created is the offense of being at one and the same time, unregistered after having been required to register, and being between the ages of 18 and 26. Indeed, coupled with § 462's provision for punishment of anyone who "evades" registration, this crime is very similar to the crime committed by an alien who unlawfully "remains" in the country. See *United States* v. *Cores*, 356 U. S. 405

(1958); majority opinion, *ante*, at —, n. 16. Under this view of the Act, the only question which the statute of limitations raises is whether, at any time within five years preceding the indictment, those two characteristics—being unregistered and between the specified age limits—accurately described the accused.

The majority concludes, however, that the only duty prescribed by § 453 is a duty to register on those specific days—and those days only—declared by the President for initial registrations. In this case, by presidential proclamation, persons not yet 18 in 1948 were to "be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter." According to the majority, once the fifth day has passed, the unregistered 18-year-old, although he has indeed committed an offense, is no longer under any further obligation to register. That conclusion is wholly at odds with the purposes of the Selective Service Act as a whole and this section in particular, as well as with the regulations, longstanding administrative interpretation and the presidential proclamation itself.

Since 1941, Selective Service regulations, issued under authority explicitly granted the President, 50 U. S. C. App. § 460; 32 CFR, Pt. 1611 (invoking authority, under § 460), have provided that:

> "The Duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be." 32 CFR § 1611.7 (c).

If there was any doubt as to whether the duty imposed by § 453 extends beyond the fifth day after petitioner's

birthday, this regulation surely sets that issue at rest.[1] Indeed, the Court apparently concedes as much since it decides to fall back on the theory that the regulation is not authorized by the Act.[2]

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[1] Despite the majority's assertion to the contrary, the quoted regulation is neither the first nor the only regulation reflecting the expectation that registration was to occur, even though it was "late" registration. Even under the 1917 Act, the regulations "prescribed by the President under the authority vested in him by the terms of the Selective Service Law," U. S. War Dept., Selective Service Regulations, at i (2d ed. 1918), provided for registration "other than on Registration Day . . . irrespective of the date on which [the applicant] was required to register." *Id.*, § 54; see U. S. War Dept., Selective Service Regulations § 54 (1917) ("Local Boards will accomplish the registration of persons subject to registration who, *for any reason*, have not been registered on or since [Registration Day]") (emphasis added). Similarly, under the 1940 Act, procedures were described for registering "[a]ll persons who present themselves for registration, *including persons who should have registered on a previous registration day* . . . ." 32 CFR § 613.11 (b) (Cum. Supp. 1944) (emphasis added). And the current regulations provide that "[t]he Director of Selective Service shall also arrange for and supervise the registration of persons who present themselves for registration at times other than on the day or days fixed for any registration." 32 CFR § 1612.1.

It is incongruous, to say the least, to admit that local boards have a duty and responsibility to register late applicants, see also 32 CFR § 1611.6, but that such applicants have no corresponding duty to cooperate with the board. Presumably under the majority's view, an unregistered male, discovered by the local board after the time for his initial registration had passed, could not be punished if he "refuses to cooperate or is inclined to evade, refuses to answer, or answers falsely . . . ." See 32 CFR § 1613.16 (provision for dealing with "recalcitrants").

[2] The majority seems concerned to distinguish the "limitations question," *ante*, at 8, from the question of whether the duty in this case is continuing, *ante*, at 10 n. 17. But the Court cannot have it both ways. If the duty continues, as the regulation prescribes, the limitations question has been settled: the definition of the "offense" was not yet exhausted when this indictment was brought. *United States* v. *Cores*, 356 U. S. 405, 409 (1958); *United States* v. *Kissel*, 218 U. S. 601, 607 (1910). If, on the other hand, the

That position, however, is simply untenable. In addition to the general authorization to the President in § 460 (b) "to prescribe the necessary rules and regulations to carry out the provisions of this title," § 453 itself expressly requires registration "at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder." The majority's reference to the 1917 Act, if it proves anything, proves just the opposite of the Court's conclusion. Under that Act, the President prescribed one day when registration was to take place, utilizing local election precincts and a registration system which were not well-equipped to take registrations on any other day.[3] By 1942, the system had been

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statute has run, then the "continuing duty" regulation must be invalid. While I can sympathize with the Court's discomfort over the position it is thus forced to assume, I view that unease as simply an additional indication that the regulations involved in this case are fully within the scope of the powers given the President under the Act.

[3] The first registration is described in U. S. Selective Service System, Registration and Selective Service, 10–11 (1946):

"The basic idea was to follow the general organization and the administrative units of the election machinery. The Governors in the States, the County Clerks, or other designated persons in the county and in registration precincts were selected or appointed registrars. The ordinary place of registration was the ordinary place for voting. Thus the normal processes of Government were utilized for this extraordinary activity."

Although it appears that late registration by local boards after Registration Day was authorized by the President, see n. 1, *supra*, until World War II and the 1940 Act, the local boards' "primary functions [were] not registration but classification and induction." *Id.*, at 23. Once Registration Day had passed, and the emergency machinery had been dismantled, special procedures were required for accomplishing late registration, see U. S. War Dept., Selective Service Regulations § 54 (b) (2d ed. 1918), and "local boards had difficulty with the proper entry or handling of registrations which, too often

streamlined to the point where local boards were open every day for the purpose of accepting new registrations. The current regulations are nothing more nor less than a setting of "times" and "places" (your nearest local board during the usual business hours)[4] for late as well as timely registrations. Within five years prior to the bringing of this indictment, petitioner—in the words of the statute—had a "time" and a "place" to register, "determined by proclamation of the President and by rules and regulations prescribed" by the President.

Despite the majority's implication to the contrary, *ante*, at 8, there is specific evidence that Congress actually was aware of this question when it acted, and that Congress did not expect that the duty to register would cease merely because the times set for initial registration had passed. During the hearings on the 1940 Act, Senator Reynolds asked then-Major Hershey whether a person could avoid his duty to register altogether by, for example, joining the National Guard—which would give him an exemption—and then getting out as soon as registration day had passed. Major Hershey replied that such persons would have to register as soon as they lost their exempt status, and he persisted in that answer

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for insufficient reason, were received late." U. S. Selective Service System, *supra*, at 91. Significantly, during subsequent registration days under the 1917 Act, when the boards once again had the help of special machinery, tens of thousands of tardy registrations were effected. *Id.*, at 15. By 1941, the boards were equipped to handle late registrations as a matter of course, resulting in the issuance of the "continuing duty" regulation. See *id.*, at 42, 91-92.

[4] See, for example, in addition to the "continuing duty regulation," the following regulation designating the "Place and time of registration":

"Any person required to be registered may present himself for and submit to registration at any designated place of registration or at the office of any local board during the hours for registration specified in the Presidential proclamation *or during the usual business hours*." 32 CFR § 1613.1 (a) (emphasis added).

despite the Senator's puzzlement (like the majority's) over the fact that the registration period would seem to have expired. The Senator finally accepted Major Hershey's explanation after assuring himself that "your registration boards are at all times in session . . . [a]nd they would be given the opportunity to register." [5] Even the relevant presidential proclamation, wholly apart from the "continuing duty" regulation, accords with this view that the duty to register is not defined solely in terms of the setting of the sun on the day originally fixed for registration. The proclamation declares that a person unable to register on the day fixed for his registration "because of circumstances beyond his control . . . shall do so as soon as possible after the cause for such inability ceases to exist." [6] Apparently, the majority concedes that in what it calls these few "exceptions," the Act does impose a valid duty to register on a day other than the initial date. That being the case, it is inconceivable to me that Congress can be said to have authorized the President to require late registration of those with a good excuse for their tardiness, but not to have similarly authorized him to require late registration of those with a bad excuse or no excuse at all.

The "continuing duty" view of § 453 receives support from an appraisal of the section's purpose in the context

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[5] Hearings on S. 4164 before the Senate Committee on Military Affairs, 76th Cong., 3d Sess., 385 (1940). See also the exchange between Senator Reynolds—by then Chairman of the Committee—and General Hershey during hearings a year later on an amendment to the 1940 Act, pointing out that the Act "gives a broad discretion to call these men in as the Army sees fit . . . [a]nd to register them as they see fit." Hearings on S. 2126 before the Senate Committee on Military Affairs, 77th Cong., 1st Sess., 34 (1941).

[6] Proclamation No. 2799, July 20, 1948, 13 Fed. Reg. 4173. Similar language is contained in the Supplementing Proclamation, No. 2942, August 30, 1959, 65 Stat. c36.

of the statute considered as a whole. Immediately following the registration requirement, § 454 declares that "every male citizen . . . who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to [§ 453] shall be liable for training and service in the Armed Forces . . . ." Since even under the majority's view, petitioner was at one time a person "required to register," this section, by its literal terms, made him still liable for induction at the time this indictment was brought. But if he still had a duty to serve, then it is completely illogical to conclude that he did not also still have a duty to register. The whole purpose of the registration section is to provide a manpower pool from which inductees can be selected; registration is but the necessary first step in the congressional scheme for processing, classifying and selecting individuals for training.[7] See *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). And the instant regulation, declaring that the duty to register "shall continue at all times," is but one of numerous provisions and regulations in the Selective Service Act which reflect the concept that continuing duties are essential if this orderly induction process is to take

[7] This view of the registration provisions, relating them to the induction provisions as a reservoir to a pipeline, was repeatedly emphasized in the hearings on the 1940 Act and amendments thereto. See, *e. g.*, Hearings on H. R. 10132 before the House Committee on Military Affairs, 76th Cong., 3d Sess., 10–11, 15, 116 (1940); Hearings on S. 2126 before the Senate Committee on Military Affairs, 77th Cong., 1st Sess., 83 (1941) ("if you do not coordinate registration and induction, you are going to run into embarrassment"); U. S. Selective Service System, *supra*, n. 2, at 1–2 ("the object . . . of registration is . . . to know where available manpower is and to be able to reach it . . .").

place.[8] Even apart from the settled rule that the "interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute," *e. g., Zemel* v. *Rusk*, 381 U. S. 1, 11 (1965), it seems clear to me that the regulation merely spells out an intent already inherent in the statutory scheme.[9] Yet

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[8] See 32 CFR §§ 1617.1, 1623.5 (registration and classification certificates must be kept in one's personal possession "at all times"); 32 CFR § 1641.7 (duty to keep local board informed of current status); 32 CFR § 1641.3 (duty "to keep [the registrant's] local board advised at all times of the address where mail will reach him"). The latter regulation was long ago interpreted as imposing a continuing duty to advise the local board of a change of address in a decision which rejected a claim similar to petitioner's that the then 3-year statute of limitations barred prosecution, because the address was changed more than three years before the indictment was brought. *United States* v. *Guertler*, 147 F. 2d 796 (C. A. 2d Cir. 1945). Presumably under the majority's theory that "continuing duties" can only be created by express provision in the statute, this decision is overruled, and the continuing duty imposed by this regulation is brushed aside—all in the face of a statute which Congress knew "wouldn't be worth a dime to us in 2 years" if registration information and lists were not "kept up to date." Hearings on S. 2126 before the Senate Committee on Military Affairs, 77th Cong., 1st Sess., 37–38 (1941).

[9] In the Military Selective Service Act of 1967, enacted June 30, 1967, 81 Stat. 100, Congress added to § 454 (a) a provision that registrants who failed or refused to report for induction were "to remain liable for induction and when available shall be immediately inducted." 50 U. S. C. App. § 454. Petitioner relies on this provision as an indication that Congress did not intend to impose continuing duties except where, as here, it used express language to that effect. The legislative history shows just the opposite to be the case. Congress assumed that, even without express language, liability for induction would continue until age 26; the amendment was prompted solely in order to "insure that a registrant who prolongs litigation of his draft classification beyond age 26 [when he would "no longer be liable for military service"] would nonethe-

the majority holds that when dawn breaks on the unregistered male, six days after his 18th birthday, his crime is complete and ended; though the Act specifically declares that he is still liable for induction, he has no obligation to take the step which makes that induction possible. I for one cannot ascribe such inconsistent intent to Congress.

The Court does not even have the excuse that its construction is required in order to avoid a serious constitutional problem. Petitioner has argued that if his duty to register continues, he cannot be punished for failing to comply since late registration would necessarily be incriminating. See *Leary* v. *United States*, 395 U. S. 6 (1969); *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968). But the Court of Appeals below drew dead aim on the defect in this argument, and the Court's opinion wisely refrains from relying on the suggested Fifth Amendment problem. For if this is a continuing offense, petitioner—as the Government concedes—is subject to only one prosecution based on his single uninterrupted course of conduct. See Model Penal Code, § 1.08, Comment, at 33–34 (Tent. Draft No. 5, 1956). Petitioner was subject to that prosecution six days after his 18th birthday; his continued failure to register did not subject him to any additional penalty beyond what he had already risked. Thus, though it may be conceded that late registration would have been incriminating, the statute here, unlike the statutes in *Marchetti*, *Grosso*, and *Leary* does not *compel* incrimination. Petitioner

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less remain liable for induction, regardless of age . . . ." H. R. Rep. No. 267, 90th Cong., 1st Sess., 30 (1967). There is not the slightest suggestion that Congress suspected that the registration and liability provisions of §§ 453 and 454—interrelated provisions which must fairly be read *in pari materia*—ever created anything other than continuing duties until the specified 26-year age limit was reached.

had nothing to gain in the form of avoiding an additional penalty by registering and revealing that his registration was late. The only possible "incentive" in this case stems from the fact that by registering, petitioner would have caused the statute of limitations to commence running, thus giving the Government only five years in which to prosecute instead of leaving prosecution open until age 31.[10] To suggest that this possibility of starting the statute running is sufficiently "attractive" to amount to "compulsion" for purposes of the Fifth Amendment is purest fancy.

The "continuing offense" is hardly a stranger to American jurisprudence. The concept has been extended to embrace such crimes as embezzlement,[11] conspiracy,[12] bigamy,[13] nuisance,[14] failure to provide support,[15] re-

[10] Petitioner has suggested that if the duty to register is continuing, there is no logical stopping place for bounding the duty, so that "a person seventy years old can be prosecuted for having failed to register fifty-two years before at the age of eighteen." Brief for petitioner, 17. But the paraded horrible overlooks the fact that the same provisions which create the duty, also indicate that the duty ends at age 26—the age beyond which no one was ever required to register under this Act and this proclamation, and beyond which no one would normally have been liable for induction. See nn. 6, 8, *supra;* S. Rep. No. 1268, 80th Cong., 2d Sess., 6 (1948) ("[r]egistration is not required of persons who have reached the age of 26").

[11] See *State* v. *Thang,* 188 Minn. 224, 246 N. W. 891 (1933).

[12] See *Gruenwald* v. *United States,* 353 U. S. 391 (1957); *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 253 (1940); *United States* v. *Kissel,* 218 U. S. 601 (1910).

[13] See *Cox* v. *State,* 117 Ala. 103, 23 So. 806 (1898); compare *People* v. *Brady,* 257 App. Div. 1000, 13 N. Y. S. 2d 789 (2d Dept. 1939), with *Commonwealth* v. *Ross,* 248 Mass. 15, 142 N. E. 791 (1924).

[14] *E. g., State* v. *Dry Fork R. R.,* 50 W. Va. 235, 40 S. E. 447 (1901).

[15] *Richardson* v. *State,* 30 Del. (7 Boyce) 534, 109 A. 124 (Ct. Gen. Sess. 1920); *Towns* v. *State,* 24 Ga. App. 265, 100 S. E. 575 (1919).

peated failure to file reports,[16] failure to register under the Alien Registration Act,[17] failure to notify the local board of a change in address,[18] and, until today, to failure to register for the draft.[19] Since the continuing offense concept too freely applied can lead to tension with the purposes of a statute of limitations, we should undoubtedly approach the task of statutory interpretation with "a presumption against finding that an offense is a continuing one . . . ." Model Penal Code § 1.07, Comment (Tent. Draft No. 5, 1956). But the presumption is by its nature rebuttable; if it is ever to give way, it must surely do so in a case such as this where every other guide to statutory interpretation points to a contrary legislative intent. To hold otherwise—to erect as the majority does an absolute bar to finding a continuing offense in the absence of express statutory language—is to shirk our judicial responsibility of interpreting Acts of Congress as they come to us, without insisting that Congress make our task easier by using some particular form of words to express its intent.[20] Our own cases dis-

[16] See *Hanf. v. United States*, 235 F. 2d 710 (C. A. 8th Cir.), cert. denied, 352 U. S. 880 (1957).

[17] *United States* v. *Franklin*, 188 F. 2d 182 (C. A. 7th Cir. 1951).

[18] *United States* v. *Guertler*, 147 F. 2d 796 (C. A. 2d Cir. 1945); see n. 8, *supra*.

[19] See *Fogel* v. *United States*, 162 F. 2d 54 (C. A. 5th Cir. 1947), cert. denied, 332 U. S. 791 (1947); *Gara* v. *United States*, 178 F. 2d 38, 40 (C. A. 6th Cir. 1949), aff'd by an equally divided Court, 340 U. S. 857 (1950); *McGregor* v. *United States*, 206 F. 2d 583 (C. A. 4th Cir. 1953). But cf. *United States* v. *Salberg*, 287 Fed. 208 (D. C. N. D. Ohio 1923) (holding the duty under the 1917 Act not to be continuing).

[20] Similarly, the requirement that criminal statutes be strictly construed in determining the substantive offense in order to prevent problems of fair warning, cf. *United States* v. *Universal Corp.*, 344 U. S. 218 (holding that defendant's acts constituted a continuing course of conduct, subject only to one prosecution), does not lead to the majority's *per se* rule in deciding what type of offense is

tinguish the "instantaneous" from the "continuing" offense on the theory that in the former case, the illegal aim is attained as soon as every element of the crime has occurred, whereas in the latter case, the unlawful course of conduct is "set on foot by a single impulse and operated by an unintermittent force," until the ultimate illegal objective is finally attained. *United States* v. *Midstate Co.*, 306 U. S. 161, 166 (1939); see also *United States* v. *Universal Corp.*, 344 U. S. 218, 224 (1952). The latter definition fits this case precisely. By his own testimony, petitioner admits that he set out to evade registration and liability for the draft. That aim could only be accomplished by remaining unregistered until he was past 26—the age of prime liability. If he had succeeded in reaching 26 and escaping liability, the Government should have its five years to detect and punish his illegal course of conduct. As it is, the Court holds that petitioner not only succeeded in his aim, but was immune from prosecution for his unlawful conduct at the age of 23. While all around him, young men were being inducted, 26-year-olds first, petitioner at 18 years and 6 days is forever free of any duty—and at 23 is forever free from prosecution for his initial failure—to place himself, like them, into the pool from which inductees are selected. I cannot agree. I would affirm.

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involved for purposes of the statute of limitations. Given the explicit provisions of § 453, the "continuing duty" regulation, and the consistent administrative interpretation of the Act, there can be no suggestion that petitioner did not have fair warning that he was required to register, or that petitioner was unfairly led into thinking that repose would be his when he reached 23.